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Supreme Court, U.S.
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No. 02-1331

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IN THE
SUPREME COURT OF THE UNITED STATES

THE CITY OF NEW YORK, RUDOLPH GIULIANI, as Mayor of the City of New York and individually, HOWARD SAFIR, as Police Commissioner of the Police Department of the City of New York and individually, et al.,

Petitioners,

-against-

PATROLMEN BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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March 6, 2003

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QUESTIONS PRESENTED

1. Was the consideration of race by the New York City Police Commissioner Howard Safir in transferring a proportionally small number of police officers from adjoining precincts into the 70th Precinct to meet the compelling state interest of effective law enforcement constitutionally permissible where there was a highly publicized assault and sexual torture of Abner Louima, a person of Haitian descent, by white police officers, in the 70th Precinct, a precinct with a 80% minority population, and the Police Commissioner was advised at a meeting with community leaders, two days after the event, that there was a potential for civil unrest, and accordingly, the Commissioner made those race-based transfers to quell the possibility of civil unrest and violence and to demonstrate to the community the Department's intent to engage in effective, unbiased law enforcement?

2. Can identical awards for emotional damages be assessed for each of twenty-six plaintiffs where each award was based exclusively on plaintiffs' subjective testimony?

LIST OF PARTIES

THE CITY OF NEW YORK, RUDOLPH GIULIANI, as Mayor of the City of New York and individually, HOWARD SAFIR, as Police Commissioner of the Police Department of the City of New York and individually, PATRICK BRENNAN, New York City Deputy Police Chief Officially and Individually, CORNELIUS J. DEVER, Deputy Police Chief, Officially and Individually and MICHAEL A. MARKMAN, Chief, Officially and Individually,

Petitioners.

PATROLMEN BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INCORPORATED for itself and on behalf of its members, GARY JOHNSON, Police Officer, MISSIE LEWIS-MANNING, Police Officer, ROBERT DRAYTON, Police Officer, MARVA GARDNER, Police Officer, and DEMETRIA SINGLETON, Police Officer, MARGO MCKENZIE, Police Officer, ROBERT WINSLOW, Police Officer, KENNETH ZEPHERIN, Police Officer, OSCAR ESPINAL, Police Officer, DAVE GUEVERA, Police Officer, PEGGY ALVES, Police Officer, ROBIN IRVIN, Police Officer, SILAS PLUNKETT, Police Officer, RONNY FORBES, Police Officer, ALTON WALKER, Police Officer, BARRY HINDS, Police Officer, TSELANEE KITCHING, Police Officer, LAVERNE STUGER, Police Officer, MICHAEL BUTLER, Police Officer, CAROLE P. SIEVWRIGHT, Police Officer, INGER BARRON, Police Officer, and RONALD S. ARCHER, Police Officer, SERGEANT'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., for itself and on behalf of its members PHILIP TAI and JOHNS S. ROBERTSON,

Respondents.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

THE CITY OF NEW YORK, RUDOLPH GIULIANI, as Mayor of the City of New York and individually, HOWARD SAFIR, as Police Commissioner of the Police Department of the City of New York and individually, et al.,

Petitioners,

-against-

PATROLMEN BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit, from which petitioners seek certiorari, was decided on October 17, 2002. The opinion is reported at 310 F.3d 43, 2002 U.S. App. LEXIS 21656, and appears in the Appendix at B1-25. Petitioners filed a petition for rehearing en banc from the October 17, 2002 opinion. The Second Circuit denied that petition, which denial was entered on December 13, 2002. That order is not

published in the Federal Reporter. It appears in the Appendix to this Petition at B76-77. [1]

Prior to trial, the United States District Court for the Southern District of New York granted the petitioners partial summary judgment. That opinion and order is reported at 74 F. Supp.2d 321, 2000 U.S. Dist. LEXIS 15179. It appears in the Appendix at B26-62.

After trial, petitioners moved for a judgment as a matter of law or a new trial while respondents moved for certain equitable relief in the United States District Court for the Southern District of New York. All the motions were denied. The District Court's opinion and order is reported at 2000 U.S. Dist. LEXIS 15179. It appears in the Appendix at B64-72.

The District Court issued its judgment, dated November 15, 2000. That judgment is not reported. It appears in the Appendix at B73-75.

JURISDICTION

The Second Circuit issued its judgment on October 17, 2002 (B1). The Second Circuit issued an order denying rehearing en banc on December 13, 2002 (B76-77). This Court has jurisdiction to review this judgment under 28 U.S.C. §1254.

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[1] Numbers preceded by the letter "B" refer to the pages of the Appendix of this Petition for a Writ of Certiorari.

Numbers in parentheses preceded by the letter "A" refer to the page numbers of the Joint Appendix filed in the Second Circuit. Numbers not preceded by the letter A refer to the page numbers of the trial transcript which is contained within the Joint Appendix filed in the Second Circuit between pages A-162 through A-1204.

STATUTORY PROVISIONS

The text of the following pertinent constitutional provisions and statutes may be found in the Appendix at B78-80.

United States Constitution

Fourteenth Amendment

United States Code

Title 42, Section 1981 Civil action for deprivation of rights

Title 42, Section 1983 Civil action for deprivation of rights

Title 42, Section 1985 conspiracy to interfere with civil rights.

STATEMENT OF THE CASE

A. Nature of Case

The Patrolmen's Benevolent Association on behalf of itself and 22 minority police officers (hereafter "plaintiffs") brought an employment discrimination action against the defendants City, Mayor Rudolph Giuliani and certain members of the Police Department including Commissioner Howard Safir (hereafter referred to collectively as "the City") (A17-A36). Plaintiffs alleged that the City's consideration of their race in transferring them from one precinct to the 70th precinct had violated the equal protection clause of the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000 (e), et seq.), § 1981, §1983, § 1985 and the New York State Human Rights Law.

The Sergeant's Benevolent Association on behalf of itself and two sergeants, Sergeants Philip Tai and John S. Robertson (also referred to as "plaintiffs") also filed suit,

alleging that the City's consideration of their race in transferring them from one precinct to the 70th precinct had violated the equal protection clause of the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000 (e), et seq.), and rights secured by 42 U.S.C. § 1981, § 1983, § 1985 (A97-A119).

B. Statement of Relevant Facts

On August 9, 1997, Abner Louima, a black man of Haitian national origin, suffered a brutal beating and sexual torture at the hands of several white police officers within the confines of the 70th Precinct stationhouse in Brooklyn, New York. The population of the precinct is approximately 80 percent black (912).

A meeting at New York City Police Headquarters was convened two days later, August 11, 1997, at the behest of New York City Councilwoman Una Clark whose constituency included the 70th Precinct (853, 925). In attendance at the meeting were Mayor Rudolph Giuliani, Police Commissioner Howard Safir, other police officials, and community leaders from the 70th and surrounding precincts, including Councilwoman Clarke. At the meeting, community leaders called for the transfer out of the 70th Precinct of police officers who were involved in the incident or who had knowledge of it (1868-1869).

Ms. Clarke and members of the community expressed their outrage as to what happened within the precinct and they demanded that any person

> who could have heard, might have heard, from the top to the bottom, including a janitor who may have been cleaning, if they were in earshot of the bathroom in which [Louima] was sodomized, that they had to leave the precinct, and that they were all in accord that unless that happened there was

going to be disturbances or that we were so outraged that we would let things fall where they may (1868-1869).

Ms. Clarke explained to the Commissioner "that unless you do something quickly, we in the community may not be able to control the rage of the community" (1870). "He was not going to sit in Police Plaza and get away with it," she testified (1880). "We told him directly at the meeting that we would have no confidence in the police department unless they took direct action because we thought that this was a brutal and uncivilized act and he had to do something" (1861). In addition, several community leaders called for the transfer of police officers into the 70th Precinct who reflected the racial and/or ethnic make-up of the community (897, 927, 1887).

As for the volatility of the community, Ms. Clarke testified that if it were not for the actions of responsible leaders of the community, "the community could have gone up . . ." (1878). She explained how such leaders prevented "provocateurs," — "persons who feel they know your community better, who are protectors of the community" — from agitating and creating problems of violence in the community (1878). Ms. Clarke herself took to the street for three or four days and night and "went to every place that there was a gathering to make sure there was no destruction of our community" (1869).

Una Clarke stated that the 70th precinct is made up of 78 ethnic groups and the majority are immigrants (1872). She testified that the 70th precinct "is quite isolated from the community that it polices to begin with" (1874). She indicated that "we are marginalized as a community, insulted in many ways and many times by the police department." (1875). She explained that prior to the Louima incident there had been several other major

incidents in the community involving police beatings and shootings (1875).

Commissioner Safir described the Louima incident as "probably the most horrific incident in the history of the NYPD of police brutality" (860). He recognized that he was dealing with "a community that we (sic) had a history that could quickly, and had in the past, mobilized tens of thousands of people" (861). The Commissioner's concern was "to keep the peace" (860-861). He wanted "to make sure that the community understood we were taking this very seriously and that we were not going to tolerate this kind of abuse by any police officer" (861).

The day after his meeting with community leaders, and cognizant of this potentially violent situation, which included demonstrations at the 70th precinct on a daily basis and constant media attention, Commissioner Safir devised a two part response. First, he dealt with the specific incident, apprehending perpetrators, "getting the precinct cleansed of whatever problems we had and getting it functioning for the short term" (854, 858, 928). To that end, the Commissioner modified the assignments of just about every police officer who was on duty during the tour of the Louima incident, that is, they were taken off enforcement duty and put on administrative details or suspended (864). Within a week of the incident, four arrests were made (864). The commanding officers of the precinct were removed and Inspector Raymond Diaz was put in as commanding officer, as well as a new second in command by August 14, 1997 (865, 868, A1338).

Second, Commissioner Safir directed that black police officers be transferred into the 70th Precinct (927). The Commissioner explained that he was acting to ensure that the community understood that the Department was actively undertaking to improve relations (928). The Commissioner was of the view that the transfer of minority

officers into the precinct lowered the potential for violence (896-897).

On August 16, 1997, 12 police officers, including two sergeants, were transferred into the 70th Precinct (A1338-1341). On or about August 25, 1997, 26 other police officers were transferred into the 70th Precinct from adjoining precincts (A1339-1340). The majority of the transferred police officers were minority: either African–American, black Hispanic or black of other descents. The Commissioner testified that in a precinct that was approximately 80 percent black, minority police officers comprised 11 per cent of the precinct's complement before the incident. After the transfers, the precinct's complement of minority police officers rose to approximately 17 per cent (912).

Ms. Clarke was asked if the transfer of black police officers in the 70th precinct had a positive effect on police/community relations. She answered this way:

> I believe it helped the community. If not for me an elected official, but for leaders who feel that the precinct ought to be more reflective of the community that is policed by the department . . . because the precinct is isolated from the community that it polices, that this creates an interface with officers more like the majority of persons who are being policed in that community. And therefore, I would consider it positive (1893).

C. Federal Jurisdiction of District Court

The District Court had jurisdiction of the original action herein pursuant to 42 U.S.C. §1983, the Fourteenth Amendment to the United States Constitution, and 28 U.S.C. §1331.

D. District Court's Opinion and Order Granting the City Partial Summary Judgment

The City moved for partial summary judgment on plaintiffs' equal protection claim, asserting that "operational needs," that is, a law enforcement body's need to carry out its mission effectively, was a defense. The City also moved to dismiss plaintiffs' claim under Title VII. Plaintiffs cross-moved for summary judgment on their equal protection claims.

In its Opinion and Order (one paper), the District Court granted partial summary judgment for the City finding that the Police Department's operational needs could constitute a compelling state interest (B40). However, the Court ruled that the City had the burden at trial of proving that such operational needs fit the circumstances of this case (B41) The City's motion for summary judgment on the civil rights claim was granted to the extent that the City could interpose as a defense that law enforcement's operational needs constituted a compelling state interest that provided a basis for race-based transfers of police officers. Plaintiffs' motion for summary judgment on the equal protection claim was denied (B46). Patrolmen's Benev. Assn. v. City of New York, 74 F.Supp.2d 321, 339 (S.D.N.Y. 1999).

E. District Court's Opinion and Order Denying the City's Motion for a Directed Verdict

After trial, the City renewed their motion for judgment as a matter of law under Rule 50(b) of the

Federal Rules of Civil Procedure and also moved for a new trial under Rules 59 and 60 (B64).

The District Court denied the motions, stating in part, that the jury heard conflicting evidence as to whether the so-called "Louima incident" was a crisis that justified race based transfers. The District Court ruled that there was adequate evidence to support the verdict (B66).

F. The Opinion of the United States Court of Appeals for the Second Circuit

By opinion entered October 17, 2002, the Second Circuit affirmed the judgment of the District Court (B3).

The Equal Protection Claim

The Second Circuit held that in order to overturn the jury's finding that the race-based transfers violated the Equal Protection Clause, the City faced a "particularly steep uphill climb" (B15). The Court stated that racial and ethnic distinctions of any sort are inherently suspect and call for the most exacting judicial examination (B15). Racial classifications must be analyzed with strict scrutiny and the classification must be narrowly tailored to further a compelling government interest (B15).

The Court noted that remediation of past discrimination is the only compelling state interest explicitly recognized by this Court (B16). However, stated the Court, the City did not seek to justify its race-based transfers on such ground; rather, the City sought to justify its race-based transfers on the compelling state interest of effective law enforcement. The Court acknowledged that a law enforcement body's need to carry out its mission effectively, with a work force that appears unbiased, is able to communicate with the public and is respected by the community it serves, "may constitute a compelling state interest" (B16).

The Court stated that mere assertion of "an operational need" does give a police department *carte blanche* to dole out work assignments based on race. Mindful of the possible abuse of the "operational need" defense, the Court observed that other courts require that the government actor demonstrate that it is "motivated by a truly powerful and worthy concern and that the racial measure . . . adopted is a plainly an apt response to that concern" (B16). The justification must be substantiated by objective evidence; mere speculation or conjecture is insufficient (B17).

The Court pointed out that race-based measures must be narrowly tailored to serve the identified interest. Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification, stated the Court (B17).

The Court stated that the jury heard from police officials that there was no rioting, looting or other violence in the 70th Precinct following the Louima incident. The Court noted that Commissioner Safir testified he believed that the NYPD had to act quickly to respond to the threat of violence, but rather than ordering immediate, temporary transfers, he chose to enact permanent transfers through normal NYPD channels which took several weeks to effect (B18).[2]

The Court asserted that petitioners contend that "common knowledge" regarding the "historical reality" of race relations in police work suffices to justify the City's actions. The Court stated that an argument in so sensitive

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[2] Rather than "several weeks,", the transfer of the minority police officers into the 70th Precinct took approximately two weeks (B6). The Court, in fact, correctly described the timing of the transfers earlier in its opinion when it summarized the facts (B6).

an areas of human relations must not be allowed to draw on common sense (B18).

The Court concluded that there may be occasions where race-conscious transfers of police officers is a constitutionally permissible means of improving law enforcement in an immediate response to an emergency situation. The Court found this was not such an occasion and ruled that the District Court correctly denied the City's motion for judgment as a matter of law (B19).

Emotional Distress Damages

The Court of Appeals further stated that the mere fact that a constitutional deprivation has occurred does not justify an award for emotional damages. The plaintiff must establish that she has suffered an actual deprivation (B22). The Court ruled that "[a] plaintiff's subjective testimony, standing alone, is generally insufficient to sustain an award of emotional damages (citation omitted)" (B22). The Court did not discuss the evidence given by each respondent police officer to justify his or her identical $50,000 award. Instead, the court merely stated that "the trial testimony was sufficient to support the jury's awards" (B24).

G. The City of New York's Petition for Rehearing En Banc

On September 27, 2002, the City filed its petition for rehearing en banc. The City argued that the Panel failed to perceive that the record contained unimpeached evidence that fully substantiated Commissioner's Safir's determination to transfer minority police officers. That evidence included the racial nature of the Louima assault, the Commissioner's reasonable view that there was a potential for civil unrest based on the uncontradicted warnings given to him by community leaders at the August 11th meeting, the demands of community leaders at that meeting to transfer police officers that reflect the ethnic and

racial make-up of the precinct, and the history of past incidents of racial brutality on members of the community by the police.

The City contended that the Panel was of the mistaken view that the propriety of the Commissioner's decision was undermined by the fact that violence and property damage did not follow the Louima incident, and therefore, Commissioner Safir misapprehended the danger posed by the Louima incident. This type of afer-the-fact analysis, the City argued, seriously undermines the executive discretion needed by a law enforcement official, such as Commissioner Safir, to make an operational determination based on the facts before him at a time certain. The Commissioner did not have the luxury that the Panel and the jury had in "second guessing" his determination, that is, in looking back at his decision. The Panel's reliance on this type of reasoning denied the City an impartial review of the judgment. There was no basis in the record for the Panel and the jury to conclude, as apparently they did, that the Commissioner's actions did not prevent civil unrest, the City contended.

On December 13, 2002, the Second Circuit denied the City's petition for rehearing en banc (B76-77).

REASONS FOR GRANTING THE PETITION

This petition raises the vital question of what limits the Constitution places on a City threatened by compelling evidence of imminent civil unrest -- warnings from minority community leaders -- from taking those steps it finds necessary to secure the safety, peace and security of its citizens.

If the Second Circuit's view remains intact, a City, like New York, is without a defense to prevent imminent civil unrest in such circumstances. As the City's expert explained at the trial, it is inappropriate to wait until a car is

overturned and the situation explodes as it did in Los Angeles (2362).

Additionally, this petition raises the propriety of identical awards for emotional damages that the jury assessed for each of twenty-six plaintiffs where each award was based exclusively on the plaintiffs' subjective testimony. Although the Circuit Court agreed with the City that testimony of emotional distress damages must be substantiated by "other evidence" that such an injury occurred, it affirmed such awards although not one plaintiff provided such "other evidence" to substantiate his or her claim.

The Equal Protection Claim

In the case at bar, Police Commissioner Howard Safir was confronted with an extreme example of racist police brutality by white police officers perpetrated upon a minority resident of the 70th Precinct. The acts of brutality both threatened that community's peace and security and undermined the Department's ability to engage in effective law enforcement. Within two days of the violent, racist acts of white police officers, Commissioner Safir was warned of the imminent potential for civil unrest by leaders of the minority community of the 70th Precinct. These same leaders requested that the make-up of the precinct bear closer relation to the ethnic and racial makeup of the community. Seeing the necessity of a forceful and direct response to the situation, Commissioner Safir immediately changed the leadership of the precinct and ordered the transfer of minority police officers into the 70th Precinct from surrounding precincts. On August 16, 1997, 12 police officers, including two sergeants, were transferred to the 70th Precinct (A1338-1341). On or about August 25, 1997, 26 police officers were transferred into the 70th Precinct (A1339-1340).

Evaluating the Commissioner's determinations and holding they did not pass constitutional muster, the Second Circuit cited the fact that no rioting, looting or other violence took place in the 70th Precinct following the Louima incident (B17). The fatal flaw in the Second Circuit's reasoning is its failure to measure the constitutional worth of the Commissioner's executive decisions to transfer minority police officers to the 70th Precinct in August 1997 based on those facts that confronted him at the time of his directives. By evaluating his judgment by what happened after the Commissioner made his determinations, the Second Circuit analyzed the constitutional ramifications of the Commissioner's actions with the inappropriate certainty of hindsight. The Circuit never considered the possibility that the Commissioner's bold decisions to change the command of the 70th Precinct and order minority police officers transferred to the Precinct may, in fact, have stemmed the potential for violence.

The more appropriate vantage point for determining the constitutional legality of the Commissioner's response to the Louima incidence is to measure its legal propriety on the basis of the unimpeached information imparted to him by community leaders at the very time he made his determination. It is under those crisis circumstances, that the issue of whether the Commissioner's assessment was justified by the compelling state interest of effective law enforcement -- that need of the Department to be able carry out its mission of maintaining. the peace and well being of the community -- should be gauged. Patrolmen's Benev. Assn. v. City of New York, supra, 74 F.Supp. 2d at 329-330. (B35).

The District Court and the Circuit Court indicated that past discrimination is the only compelling state interest explicitly recognized as such by this Court. Patrolmen's

Benev. Assn. v. City of New York, supra, 310 F. 3d at 52; Patrolmen's Benev. Assn. v. City of New York, supra, 74 F. Supp. 2d at 329-330 (B16, 35). However, both Courts also recognized that a law enforcement body's need to carry out its mission effectively, with a workforce that appears unbiased, is able to communicate with the public and is respected by the community it serves, may constitute a compelling state interest. Id. (B16, 40-41).

In recognizing that law enforcement operational need may constitute a compelling state interest, the District Court relied on the theory espoused in a law review article cited by the City:

> A predominately white police force may face a serious barrier to its law enforcement activities in the hostility of members of the black community. Black hostility toward the police may arise from the distrust of the white establishment, whose power and authority the police symbolize; racist attitudes and practices by white police officers; or past discrimination by the municipality in the provision of law enforcement services to black residents. This hostility can be expressed in a variety of ways, from passive non-cooperation with police investigative efforts to active rejection of the rule of law; in its most extreme form, hostility can be manifested in mass rioting or widespread looting (B39).

Race as an Employment Qualification, 54 N.Y.U. L. Rev. at 413-414. The District Court also cited the National Advisory Comm'n on Civil Disorder, Report 9-11, 299 (New York Times ed. 1978) (the "Kerner Commission") ("We have cited deep hostility between police and . . . communities as a primary cause of the disorders surveyed

by the Commission . . . In practically every city that has experienced racial disruption since the summer of 1964 - abrasive relationships between police and [blacks] have been a major source of grievance, tension and, ultimately, disorder.") (B39-40).

The Circuit Court acknowledged "a law enforcement body's need to carry out its mission effectively, with a workforce that appears unbiased, is able to communicate with the public and is respected by the community." Barhold v. Rodriguez, 863 F.2d 233, 238 (2d Cir. 1988) (B16). The Circuit Court also recognized that several courts have relied on the "operational need" of law enforcement and correctional agencies to uphold hiring assignments practices that favored minorities, even in the absence of past discrimination. See e.g., Talbert v. City of Richmond, 648 F.2d 925, 931-932 (4th Cir. 1981); Wittmer v. Peters, 87 F.3d 916, 921 (7th Cir. 1996); Reynolds v. City of Chicago, 296 F.3d 524, 530-533 (7th Cir. 2002); Minnick v. Dep't of Corrections, 95 Cal. App. 3d 506, 520-521, 157 Cal. Reptr. 260, 268-269 (1979) (B16).

To justify race-based transfers that meet the a compelling state interest of operational, the Circuit Court stated 1) that the City had to demonstrate that the transfers were justified by objective evidence; mere speculation or conjecture was insufficient (B17); 2) that the race-based measures were narrowly tailored to serve the identified interest (B17); and 3) that the mere recitation of "common knowledge" regarding the "historical reality" of race relations in police work would not suffice to justify the City's actions (B18-19). In the instant matter, the unimpeached evidence more than met all three requirements.

In this case, the objective evidence was the unimpeached warnings of community leaders. Abner

Louima was sodomized by white police officers in the bathroom of the 70th Precinct. Not surprisingly, Councilwoman Una Clarke warned the Commissioner "that unless you do something quickly, we in the community may not be able to control the rage of the community" (1870). In addition, she placed the incident in context: "[w]e are marginalized as a community, insulted in many ways and many times by the police department." (1875) She explained that prior to the Louima incident there had been several other major incidents in the community involving police beatings and shootings (1875). This testimony provided unimpeached objective evidence of impending disturbances.

The Circuit Court properly noted that, in determining whether a race-based measure is narrowly tailored, such factors as the need for the measures, the efficacy of alternative measures, and flexibility and duration of the measure should be considered (B17). United States v. Paradise, 480 U.S. 149, 171 (1987). The Commissioner properly dealt with all of these factors.

The Commissioner testified that in a precinct that was approximately 80 percent black, before the incident, minority police officers comprised 11 per cent of the precinct's complement. After the transfer of about 25 officers from adjoining precincts, it rose to approximately 17 per cent (912). In this light, it is clear that the Commissioner's response was proportional and narrowly tailored. The Commissioner explained that he was undertaking to ensure that the community understood that the Department was doing things to improve relations (928). The Commissioner was of the view that the transfer of minority officers into the Precinct lowered the potential for violence (896-897).

With regard to the issue of flexibility and duration, the Commissioner explained that he did not want transfers

made on a temporary basis because he did not want the community to view his response as "a quick fix where there could be another occupying army that would come in and leave and would have no reason to make an investment in the community where they were working permanently" (931). The Commissioner did explain that the officers could eventually request transfers out according to the needs of the service, making their transfers no different in duration than transfers made in the Department for other tactical reasons (872-873, 929). Again, the Commissioner made a determination regarding the duration of the transfers based on the situation that he confronted at the time. The "duration" of the transfers was based on what the Commissioner thought would meet the needs of effective law enforcement and, thereby, stem the outbreak of civil disorder.

The Circuit Court cited with approval the alternative suggestions of voluntary transfers or transferring Creole-speaking Haitian American officers and officers trained in community relations recommended by plaintiffs' expert, Dr. Leinen (B18). While these recommendations have a superficial appeal, the Circuit Court failed to mention that Dr. Leinen had no experience with civil unrest and cited no studies to support his view. In addition, the Circuit Court fatally undermined its own logic by mistakenly criticizing the Commissioner for ordering transfers "that took several weeks to take effect" (B18). The fact is, as explained by the City's expert, and the Commissioner himself, a swift definitive response was called for and accomplished in little more than two weeks. It was reasonable to conclude that, under the crisis circumstance that prevailed, plaintiff's expert's suggestions would have been ineffective because they would have taken significantly longer to put into place than those transfers accomplished by the Department at the time.

The Circuit Court took the untenable position that the mere suggestion of alternatives to the Commissioner's position provides the basis for finding that his determinations violated constitutional limitations. Such a view ignores the fact, as recognized by this Court, that such complex problems of race have no universal answers. United States v. Paradise, supra, 480 U.S. at p. 184.

The City called as its expert, the former Director of the Newark Police Department, Hubert Williams. Williams served in Newark during the time of its 1967 riots, and was for 15 years President of a police research institute, the Police Foundation. The Foundation had been funded by the Ford Foundation for 30 years (2328, 2331, 2347-2348, 2338). Unlike plaintiffs' expert, Williams was familiar with the Report of the National Advisory Commission on Civil Disorder, commonly known as the "Kerner Commission Report" (2350). He described the report as critical to the understanding of civil disorders in this country (2352).

Based on information provided by Commissioner Safir and Deputies Kelleher and Markham, and the trial testimony of Una Clark, Williams was of the opinion that there was potential for civil disturbances in the 70th Precinct after the Louima incident (2356). Williams testified that Commissioner Safir, in his view, properly removed the precinct's command and transferred out some officers (2359). Williams was of the opinion that the removal of Caucasian officers and the transfer of a number of African–Americans into the precinct played a significant factor in defusing tension. Williams explained that "this tension arises out of perception, what people believe, and the community was asking for people that they could relate to, that look like them, that reflected the community" (2358-2359).

Swift definitive action was called for, Williams indicated (2362). It was inappropriate to wait until a car

was overturned and the situation began to explode as it did in Los Angeles, Williams opined (2362). In his 36 year experience, Williams found nothing to compare with the Louima incident as an extreme racial incident (2367).

Williams testified further that police officers, by their training and skill, can patrol in any area regardless of race (2408). But what plaintiffs missed, he explained, was that "in order for the police officer and Police Department to be effective in doing their job, they've got to have the cooperation and support of the community that they service and the reason why is because the vital information for crime control does not vest in the police, it vests in the people that live in those neighborhoods" (2409). Williams stated that in his view white police officers can do the job of policing as effectively as anyone else. However, when there is a crisis atmosphere, as existed in the 70th Precinct, "the issue is whether or not the people are going to let [the police] do their job because it is a mutuality in terms of relationship. And if there is a lot of hostility then it might not be a good idea to bring in a white officer that you know is skilled and can do his job until you can bring down the level of tension and volatility in the community. And that's typically what police chiefs do across the United States" (2467-2468). Plaintiffs, on the other hand, did not call any witness with experience or knowledge of civil unrest to challenge William's views and conclusions.

The on-the-ground confirmation of Commissioner Safir's actions and William's views was presented to the jury by unrefuted eye witness testimony of the bubbling Louima crisis. Inspector Raymond Diaz, who took over command of the 70th Precinct on August 12 or 13, three or four days after the Louima incident, testified that there were daily demonstrations and a very large media presence outside of the precinct (2047-2048). He described the situation this way: "It was a very, very tense situation. I

mean, people were very, very angry, and it was like a powder keg was going to blow (2085)." He also testified that "it was a common comment that people wanted to see officers reflective of the community . . ." (2060).

Chief Michael Markham, Chief of the Personnel Bureau, explained that in his 37 years in the Department, having commanded precincts, divisions and boroughs, the "cry from every community" was "they wanted people more representative of themselves" (1498). As for Commissioner Safirs' response to the Louima incident, Chief Markham testified:

> Once the Commissioner made his moves, he announced to the community that he was going to change the structure, the command structure of the precinct, which he did – he said he was going to move in minorities, which he did, and I think that calmed the whole situation. That's why you did not have any problems in the community. It was addressed immediately (1613-1614).

As this Court has observed, the choice of remedies to redress a racially charged situation like that confronting Commissioner Safir involves complex problems to which there are no universal answers. "There is obviously is no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instant." United States v. Paradise, supra, 480 U.S. at p. 184, quoting, Green v. School Board, New Kent County, 391 U.S. 430, 439 (1968). It follows from the principles of Paradise, that it is not enough merely to disagree with the Commissioner's determinations as plaintiffs and the Circuit Court did. Instead, plaintiffs carried the burden of demonstrating that the Commissioner failed to exercise sound discretion under

the circumstances before him. Id. There is no evidence submitted at trial that he did not do so.

In sum, the holding of the Second Circuit calls out for this Court's review. Commissioner Howard Safir was confronted with a incendiary situation, born of persistent racism, that threatened to burst into the flames of civil unrest. His duty as Police Commissioner was to take those steps that, under the facts before him, he determined would best fulfill the law enforcement mission of maintaining the peace and safety of the community. There can be no dispute that if he had done nothing and that first car had been turned over and wide spread civil disturbances had ensued, he and the City would have been subject to scorching criticism based on a failure to take heed of the history of civil unrest -- an accumulated history replete with repetitive examples of white police brutality on minority citizens, including in the 70th Precinct, and the simmering resentment of communities subject to the long standing racist indignities of a demonstrably insensitive police force. The Commissioner's failure to act in such a situation could likely have been another unfortunate chapter of a civic leader ignoring the findings of the Kerner's Commission Report that the primary cause of racial disruption are the abrasive relationships between police and minorities.

Or the Commissioner could have taken the proportionate, responsive steps that he did, reflecting the concerns of a Department and City intent on not repeating the past. The convincing, unchallenged evidence of imminent civil unrest provided to the Commissioner by Councilwoman Una Clarke and other community leaders, and of their desire for an increased ethnic presence in the Precinct render the Second Circuit decision an unfortunate exercise in second guessing in light of the facts before it.

The reality and wisdom of Commissioner's decisions are worthy of this Court's review.

Emotional Distress Damages

The City argued, and the Circuit Court agreed, that that the mere fact that a constitutional deprivation has occurred does not justify the award of damages for emotional distress. Carey v. Piphus, 435 U.S. 247, 263-264 (1978) (B22). Emotional distress damages "must be supported by competent evidence concerning the injury." Id. at p. 264 n.20 (B22). "A plaintiff's subjective testimony, standing alone, is generally insufficient to sustain an award of emotional distress damages." See e.g., Cohen v. Bd. of Education, 728 F.2d 160, 162 (2d Cir. 1984) (B22). "Rather the plaintiff's testimony of emotional injury must be substantiated by other evidence that such an injury occurred, such as testimony to the plaintiff's distress." Miner v. City of Glens Falls, 999 F.2d 655, 663 (2d Cir. 1993) (B22). Nonetheless, the Circuit Court summarily concluded that "the trial testimony was sufficient to support the jury's damages award" without any citation to the evidence elicited at trial (B24).

The difficulty with the Circuit Court's conclusion was that each plaintiff only testified to his or her alleged emotional distress. No corroborating evidence of alleged symptoms was provided by any other plaintiff or witness. Having failed to proffer any such evidence, the Circuit Court erred when it affirmed the jury's cookie-cutter damage assessment of $50,000 as to each plaintiff. The Circuit Court's decision leaves a municipality at the mercy of the subjective claims of litigants for damages of emotional distress. Such a result ignores this Court's direction in Carey v. Piphus, supra, 435 U.S. at 264 n20, that the award of such damages must be supported by competent evidence.

CONCLUSION

For the reasons set forth, the City respectfully asks this Court to grant its petition for a writ of certiorari.

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March 6 ,2003

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2001

(Argued January 30, 2002 Decided: October 17, 2002)

Docket No. 00-9538

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INCORPORATED, for itself and on behalf of its members, GARY JOHNSON, Police Officer DRAYTON, Police Officer, MARVA GARDNER, Police Officer, DEMETRIA SINGLETON, Police Officer, MARGO MCKENZIE, Police Officer, ROBERT WINSLOW, Police Officer, KENNETH ZEPHERIN, Police Officer, OSCAR ESPINAL, Police Officer, DAVE GUEVERA, Police Officer, PEGGY ALVES, Police Officer, ROBIN IRVIN, Police Officer, SILAS PLUNKETT, Police Officer, RONNY FORBES, Police Officer, ALTON WALKER, Police Officer, BARRY HINDS, Police Officer, TSELANEE KITCHING, Police Officer, LAVERNE STUGER, Police Officer, MICHAEL BUTLER, Police Officer, CAROLE P. SIEVWRIGHT, Police Officer, INGER BARRON, Police Officer, RONALD S. ARCHER, Police Officer,

Plaintiffs-Appellees,

SERGEANT'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INCORPORATED for itself and on behalf of its members, PHILIP TAI AND JOHN S. ROBERTSON,

Consolidated-Plaintiffs-Appellees,

-against-

CITY OF NEW YORK, RUDOLPH GIULIANI, as mayor of the City of New York and Individually, HOWARD SAFIR, as Police Commissioner of the Police Department of the City of New York, and Individually, PATRICK BRENNAN, New York City Deputy Police Chief Officially and Individually, CORNELIUS J. DENVER, Deputy Police Chief, Officially and Individually and MICHAEL A. MARKMAN, Chief, Officially and Individually,

Defendants-Appellants.

Before:

LEVAL and CALABRESI, *Circuit Judges*,
and STEIN, *District Judge*.[1]

Twenty four black and black-Hispanic New York police officers brought this action in the United States District Court for the Southern District of New York (Shira A. Scheindlin, *Judge*) against the City of New York, the former mayor and certain police officials (collectively, "the City"), alleging employment discrimination and violations of their rights to equal protection of the laws arising out of their race based transfers to the 70th Precinct in the wake of the beating and torture of Abner Louima. Following a jury verdict, judgment was entered against the City for discriminating against one police officer and violating the equal protection rights of all the police officers, and damages were awarded. The City appealed. We affirm the judgment and conclude that the damages awarded were not

[1] The Honorable Sidney H. Stein of the United States District Court for the Southern District of New York, sitting by designation.

excessive.

Affirmed.

JULIEN L. KALKSTEIN (Michael D. Hess, Larry A. Sonnenshein on the brief), Corporation Counsel of the City of New York, New York, NY, *for Appellants*.

LINDA M. CRONIN (Eric S. Crusius, Rocco G. Avallone, on the brief), Cronin & Byczek LLP, Lake Success, NY, *for Appellees Patrolmen's Benevolent Association.*

PETER J. BLESSINGER (Norman A. Olch, on the brief), Cerrone & Geoghan, New York, NY, *for Appellees Tai and Robertson.*

STEIN, *District Judge*:

Defendants appeal from a judgment of the United States District Court for the Southern District of New York (Shira A. Scheindlin, *Judge*) upon a jury verdict in favor of plaintiffs. Appellants are the City of New York, former New York City Mayor Rudolph Giuliani, former Police Commissioner Howard Safir, and certain other police officials (collectively, "the City"). Appellees are the Patrolmen's Benevolent Association of the City of New York, on behalf of 22 individual police officers, and the Sergeant's Benevolent Association of the City of New York, on behalf of two police sergeants. Plaintiffs, all of whom are black or black-Hispanic, sued the City for transferring them into New York City's 70th Precinct on

the basis of their race in the wake of the beating and torture of Abner Louima, a black man, by police officers in the 70th Precinct in August 1997. They asserted violations of Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. At the conclusion of a three-week trial, the jury returned a verdict in favor of the City with respect to all but one of the plaintiffs on the employment discrimination claims, but found in favor of all plaintiffs on the equal protection claim, and awarded $50,000 damages to each plaintiff. After the District Court denied the City's motion for judgment as a matter of law or, in the alternative, a new trial, the City filed this appeal.

The City asserts the following grounds for appeal: 1) plaintiff Oscar Espinal (the only plaintiff to prevail on the Title VII employment discrimination claim) failed to establish that he suffered an adverse employment action when he was transferred to the 70th precinct; 2) the City demonstrated that the race-based transfers, as a matter of law, were narrowly tailored to meet the compelling state interest of effective law enforcement and therefore did not violate the equal protection clause; 3) the jury charge on the "narrowly tailored" prong of the strict scrutiny test was erroneous; 4) the trial judge improperly "coerced" the jury to award damages to each plaintiff by issuing supplemental instructions on damages; 5) the jury charge on damages was erroneous; and 6) the damages awarded were excessive. We affirm the judgment of the district court.

BACKGROUND

The following facts are taken from the district court's opinion denying summary judgment, *Patrolmen's Benevolent Ass'n of New York, Inc. v. City of New York*, 74 F. Supp. 2d 321, 325-26 (S.D.N.Y. 1999), and the trial record. On August 9, 1997, Haitian immigrant Abner Louima was beaten and ignobly tortured by police officers in the 70th Precinct station house in Brooklyn, New York. Louima was black and the officers who assaulted him were white. Two days after the assault, leaders of the New York City Police Department ("NYPD") and the City—including Commissioner Safir and Mayor Giuliani—met with 40 to 50 leaders of the community surrounding the 70th Precinct, including Councilwoman Una Clarke, to discuss an appropriate response to the incident. Following that meeting, Commissioner Safir decided to assign additional black police officers to the 70th Precinct.

News reports of the Louima incident began to appear on August 12. The first of several public demonstrations in response to those reports of the assault was held at the 70th Precinct the next day. Police and city officials grew concerned that the protests might become violent. On August 14, Commissioner Safir and Mayor Giuliani announced that the commanding officer and executive officer of the 70th Precinct, as well as ten police officers assigned to that precinct, were being immediately reassigned.

A few days later, the new commanding and executive officers assumed control of the precinct, and new officers replaced those who had been removed. The commanding and executive officers were Hispanic and white, respectively, and the majority of the incoming

officers were black or Hispanic. (A. 459-60, 1333.)[2] The following week, the NYPD transferred an additional 26 black and black-Hispanic police officers into the precinct. (A. 1334-35.) The City does not dispute that race was the basis for the transfers. On August 29, some 6000 demonstrators marched from Grand Army Plaza in Brooklyn to City Hall in Manhattan in protest over the Louima assault. Following the rally, approximately 100 individuals were arrested for impeding traffic on the Brooklyn Bridge. (A 1270.) Demonstrations continued outside the 70th Precinct for the next several days.

The Patrolmen's Benevolent Association, representing 22 of the transferred officers—who identify themselves variously as African-American, Black-Hispanic, Jamaican, West Indian, Trinidadian or Guyanese—filed this action in the U.S. District Court for the Southern District of New York in October 1997, alleging violations of Title VII, 42 U. S. C. §§ 2000(e) et seq., N.Y. Executive Law § 296, and the officers' constitutional rights pursuant to 42 U. S. C. §§ 1981, 1983 and 1985. The Sergeant's Benevolent Association, representing two transferred police sergeants, subsequently filed a complaint asserting essentially the same claims and the actions were subsequently consolidated. On cross-motions for summary judgment, the District Court 1) declined to grant summary judgment dismissing the Title VII claim on the grounds that disputed issues of fact existed with respect to whether plaintiffs had suffered an adverse employment action and 2) held that the City's need for effective law enforcement could be a compelling state interest justifying a race-based measure if the City could

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[2] References to "A. __" are to the appropriate page of the joint appendix on appeal.

prove at trial that such an interest existed and that the transfers were narrowly tailored to advance that interest. *See Patrolmen's Benevolent Ass'n*, 74 F. Supp. 2d at 339.

A jury trial was held from May 25 to June 15, 2000. More than 40 witnesses testified at the trial, including all of the plaintiffs, other NYPD officers and officials, Commissioner Safir, two expert witnesses, and Councilwoman Clarke.

At the trial, defendants contended that the transfers, admittedly race-based, were necessary to prevent a delicate situation from getting out of control. Commissioner Safir stated that there was a "great potential for violence" in the 70th Precinct following the Louima incident and "we needed to act quickly and as quickly as possible to put people in the community who would have a stake in the community." (A. 468.) Safir testified that at the meeting held at police headquarters several days after the incident that was referred to above, "one of the themes that continually came out . . . was the theme that they needed more African-American officers . . . and that if we wanted better police community relations then we needed to assign more African-American police officers to their community." (A. 475.)

Councilwoman Clarke testified that at the same meeting she told Safir "unless you do something quickly we in the community may not be able to control the rage of the community." (A. 820.) Clarke did not specifically request a transfer of black officers into the precinct, although she did call for the removal from the precinct of any officer who may have known about the incident. (A. 821.) She testified that other community members "may have" requested more black officers in the community.

Defendants' expert Hubert Williams, former Director of the Newark, New Jersey Police Department, testified that he believed the race-based transfers were "a very important step in defusing the volatility that existed in the community." (A. 991.) In Williams' view, there was a danger of civil disturbance in the 70th Precinct after the Louima incident and the transfer of black officers into the precinct helped to defuse tensions. He believed that the volatile situation after the incident called for swift action, and Safir was correct in responding to Clarke's "indirect" request for more black officers. (A. 1015.)

In response, plaintiffs presented evidence that the community surrounding the 70th Precinct, while outraged, was peaceful following the Louima incident. Detective Yvan Pierrelouis, Caribbean liaison for the NYPD, testified that he canvassed the community following the incident and found no evidence of rioting, looting, or property damage. (A. 276.) Police Officer Corlis Smith, an officer in the Community Affairs Division assigned to monitor the community in the days after the incident, testified that she witnessed no community unrest. (A. 257-260.)

The plaintiffs' testimony indicated that, far from being welcomed by black residents of the 70th Precinct, the transferred officers endured frequent insults and epithets from community members angry about the Louima assault. (*See, e.g.*, A. 384.) Several plaintiffs also testified to tensions with the other officers in the precinct, who viewed the new officers with suspicion, believing they were part of an NYPD internal affairs investigation into the 70th Precinct. (*See, e.g.*, A. 237.) Plaintiffs' expert Dr. Stephen Leinin, a sociologist and former New York City police officer, testified that black officers were not necessarily better at policing black communities than white officers,

and that cultural similarities—such as language skills—were more important than race. (A. 844.) He also suggested other ways the City could have responded to the crisis, such as providing incentives for officers to transfer voluntarily into the district, and reaching out to Haitian-American officers and officers of different ethnic groups with training in police-community relations. (A. 847.)

At the close of evidence, defendants moved for a directed verdict on the employment discrimination claims on the grounds that no plaintiff had suffered an adverse employment action, and on the equal protection claim on the grounds that no reasonable juror could find that there was not a crisis that justified Commissioner Safir's decision to transfer minority officers into the 70th Precinct. The court denied the motions. (A. 1094-95.)

The trial judge then charged the jury. On the City's defense to the equal protection claim, she instructed the jury that it first had to determine whether the City had proved that "community hostility towards the New York City Police Department following the Louima incident created a crisis which compromised the goals of effective law enforcement and public safety; and that race-based transfers would restore those goals." The City did not object to that instruction. (A. 1132.)[3] If the jury found that such a compelling state interest existed, it was charged to consider, next, whether the transfers were "narrowly

[3] The verdict sheet phrased this somewhat differently, as follows: "Did defendants prove, by a preponderance of the evidence, that the transfer of plaintiffs into the 70th Precinct based on their race was *necessary* to maintain effective law enforcement and to ensure public safety in the wake of the Louima incident?" (A. 1363) (emphasis added). Just as the City did not object to the instruction, it did not object to the verdict sheet.

tailored" to satisfy that interest; in other words, "whether the race-based transfers were better suited to address the police department's compelling interest in maintaining community order following Louima than any other available alternative." (A. 1133.)

With respect to damages, the trial judge instructed the jury that if it found in favor of a plaintiff on any claim, it could award damages to compensate the plaintiff for his or her injuries, including "lost wages or lost promotion and career opportunities, as well as damages for physical pain and suffering, mental anguish, shock, fear, humiliation, and discomfort." (A. 1133.) However, the jury could only award damages for emotional distress on the constitutional claim if plaintiffs provided "convincing evidence that their emotional distress over the 70th Precinct transfers resulted in physical manifestations."[4] (A. 1134.) The court informed

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[4] The district court's instruction on emotional distress damages was as follows:

> In order to prove injury resulting from emotional distress under sections 1981 and 1983, plaintiffs must demonstrate, by a preponderance of the evidence, that they suffered "concrete" emotional problems. Concrete emotional problems may be established through evidence of physical manifestations of emotional suffering, such as sleeplessness, headaches, loss of appetite, crying spells, or trembling. Plaintiffs are not required to demonstrate that they sought medical treatment for their distress, nor are they required to present corroborating evidence of that distress from doctors, clergy, or family members. However, plaintiffs must provide convincing evidence that their emotional distress over the 70th Precinct transfers resulted in physical manifestations. Evidence of emotional suffering absent such physical manifestation is insufficient to prove concrete injury leading to recovery of damages, and I stress again that is only with respect to [sections] 1981 and 1983 [the claims for violation of equal protection], not Title VII.

the jury that nine of the 24 plaintiffs—Robert Drayton, Silas Plunkett, Phillip Tai, Lavern Stuger, John Robertson, Peggy Alves, Margo McKenzie, Oscar Espinal, and Missie Lewis-Manning—had presented physical evidence of emotional distress. (A. 1134.)

On the afternoon of the first day of deliberations, the jury announced that it had reached a verdict. The jury found that only one plaintiff, Oscar Espinal, had suffered an adverse employment action and found in favor of Espinal on the Title VII claim. (A. 1171.) With respect to the equal protection claim, the jury found that the City had failed to establish a compelling state interest justifying the transfer of plaintiffs into the 70th Precinct based on their race and therefore found for plaintiffs on their equal protection claims. The jury awarded $50,000 "compensatory damages" to each plaintiff.

Judge Scheindlin determined that, in light of her instruction that only nine plaintiffs could recover damages for emotional distress, the jury's award of $50,000 to each of 24 plaintiffs was inconsistent with only one plaintiff having suffered employment discrimination and only nine plaintiffs having suffered emotional distress with physical manifestations. (A. 1171.) She therefore read a supplemental instruction to the jury that "mental anguish, shock, fear, humiliation and discomfort, as a matter of law, are part of emotional distress." (A. 1173.) The court then instructed the jury to resume deliberations, and stated that the jury was entitled to reconsider or stand by its findings on liability, "[b]ut then when you face damages on the

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(A. 1134.)

1983 charge, you have to decide what the damages are that you are compensating for. . . ." (A 1174.)

The next day, the judge read a second supplemental charge modifying her earlier instruction on damages:

> If you determine that a plaintiff's evidence of emotional distress is corroborated by other testimony, then you need not find a physical manifestation of such distress. In determining whether a plaintiff's testimony of emotional injury is corroborated, you may consider the testimony of other officers as possible corroboration.

(A. 1189.) In response to a subsequent question from the jury asking for a definition and examples of corroboration, the court stated that "[c]orroboration is any evidence other than a plaintiff's own testimony that supports that testimony" and declined to give examples. (A. 1194.)

Three hours later, the jury returned with its second verdict. As in the first verdict, it found that only Espinal had suffered an adverse employment action, but that the City was liable on the § 1983 claim. Once again, the jury awarded $50,000 to each of the plaintiffs. The foreperson stated that all the damages were for emotional distress, with the damages for nine plaintiffs based on physical symptoms and the damages for the other plaintiffs based on corroborating evidence. (A. 1196-97.)

After the verdict, defendants renewed their motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) and also moved for a new trial pursuant to Fed. R. Civ. P. 59. The court denied the motions, *see Patrolmen's Benevolent Ass'n of New York, Inc., v. City of New York*,

No. 97 Civ. 7895, 2000 WL 1538608 (S.D.N.Y. Oct. 18, 2000), and this appeal followed.

DISCUSSION

A. Motion for Judgment as a Matter of Law

We review *de novo* a decision on a motion for judgment as a matter of law, applying the same standard as the district court. *See Dailey v. Societe Generale*, 108 F.3d 451, 455 (2d Cir. 1997). The motion should be denied unless, "viewed in the light most favorable to the nonmoving party, 'the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached.'" *Samuels v. Air Transport Local 504*, 992 F.2d 12, 14 (2d Cir. 1993) (quoting *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970)).

The City contends that it is entitled to judgment as a matter of law 1) on the Title VII claim because plaintiff Espinal did not suffer an adverse employment action and 2) on the equal protection claim because the race-based transfers were justified by the City's compelling state interest in law enforcement. Because we find that the jury's verdict was supported by adequate evidence, we affirm the district court's denial of judgment as a matter of law on both claims.[5]

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[5] To the extent that appellants request a new trial on these claims on the grounds that the verdict was against the weight of the evidence, (Appellant Br. at 62, 79), that request must be denied because it was not raised before the trial judge. *See Scientific Holding Co. v. Plessey, Inc.*, 510 F.2d 15, 28 (2d Cir. 1974); (A. 1383).

1. Espinal's Title VII Claim

Title VII forbids an employer from discriminating against employees with respect to the "compensation, terms, conditions, or privileges of employment," or "limit[ing], segregat[ing], or classify[ing] . . . employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" on the basis of race. 42 U.S.C. § 2000e-2(a).

To constitute an adverse employment action in violation of Title VII, a change in working conditions must be "materially adverse." *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000). A materially adverse change "must be more disruptive than a mere inconvenience or an alteration of job responsibilities" and "might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." *Id.* (internal quotation and citation omitted). *See also Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997). A lateral transfer that does not result in a reduction in pay or benefits may be an adverse employment action so long as the transfer alters the terms and conditions of the plaintiff's employment in a materially negative way. *See de la Cruz v. New York City Human Resources Admin. Dep't of Social Servs.*, 82 F.3d 16, 21 (2d Cir. 1996) (transfer to "less prestigious" unit of social services department with reduced opportunities for professional growth was adverse employment action); *Rodriguez v. Board of Educ.*, 620 F.2d 362, 366 (2d Cir. 1980) (transfer of experienced middle school art teacher to elementary school constituted adverse action).

At trial, Espinal testified that prior to joining the NYPD, he had received training in domestic violence issues and had worked as a caseworker for agencies serving domestic violence victims. (A. 628.) Upon joining the police force, he was assigned to the 68th Precinct where he requested and was granted work in the domestic violence unit. When Espinal was transferred to the 70th Precinct, he unsuccessfully sought an assignment as a domestic violence officer. (A. 630.) Espinal further testified that community members in the 70th Precinct shouted abusive comments at him, and he feared for his safety because the level of mistrust among the other officers in the precinct prevented the open communication necessary to effective police work. (A. 630, 631.) The jury was entitled to conclude from the above testimony, if it so chose, that the transfer had a sufficiently material negative impact on the terms and conditions of Espinal's employment with the NYPD to constitute an adverse employment action.

2. Equal Protection Claim

In seeking to overturn the jury's finding that the race-based transfers violated the Equal Protection Clause, the City faces a particularly steep uphill climb. It is well-established that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Regents of the University of California v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Justice Powell). Accordingly, all racial classifications imposed by a government actor "must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). To survive that strict scrutiny, a racial classification must be narrowly tailored to further a compelling governmental interest. *Id. See also Wygant v. Jackson Bd. of Educ.*, 476

U.S. 267, 274 (1986); *United States v. Secretary of Housing and Urban Development*, 239 F.3d 211, 218-19 (2d Cir. 2001) *cert. denied*, 122 S. Ct. 643 (Dec. 3, 2001).

The remediation of past discrimination is the only compelling state interest explicitly recognized as such by the Supreme Court. *See United States v. Paradise*, 480 U.S. 149, 167 (1987); *Wygant*, 476 U.S. at 274-75. *See also Reynolds v. City of Chicago*, 296 F.3d 524, 530 (7th Cir. 2002); Susan M. Maxwell, Note, *Racial Classifications Under Strict Scrutiny: Policy Considerations and the Remedial-Plus Approach*, 77 Tex. L. Rev. 259 (1998). However, the City does not seek to justify the race-based transfers on this ground. Instead, the City argues that the transfers were justified by its compelling interest in effective law enforcement. We have recognized that "a law enforcement body's need to carry out its mission effectively, with a workforce that appears unbiased, is able to communicate with the public and is respected by the community it serves," may constitute a compelling state interest, *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988), and several courts have relied on the "operational need" of law enforcement and correctional agencies to uphold hiring or assignment practices that favored minorities, even in the absence of past discrimination. *See, e.g., Talbert v. City of Richmond*, 648 F.2d 925, 931-32 (4th Cir. 1981); *Wittmer v. Peters*, 87 F.3d 916, 921 (7th Cir. 1996); *Reynolds*, 296 F.3d at 530-31; *Minnick v. Dep't of Corrections*, 95 Cal. App. 3d 506, 520-21, 157 Cal. Rptr. 260, 268-69 (1979).

The mere assertion of an "operational need" to make race-conscious employment decisions does not, however, give a police department *carte blanche* to dole out work assignments based on race if no such justification

is established. The assignment of police officers to certain neighborhoods or tasks because of their race has been rightly held to run afoul of the Fourteenth Amendment. *See, e.g., Baker v. City of St. Petersburg*, 400 F.2d 294, 300 (5th Cir. 1968). Mindful of the potential for abuse in an "operational need" defense to race-based employment actions, courts recognizing the defense have required the government actor to demonstrate that it is "motivated by a truly powerful and worthy concern and that the racial measure . . . adopted is a plainly apt response to that concern." *Wittmer*, 87 F.3d at 918. The justification must be substantiated by objective evidence—mere speculation or conjecture is insufficient. *Id.* at 918-19; *see also McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998); *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 213-14 (4th Cir. 1993).

Further, the race-based measure must be narrowly tailored to serve the identified interest. "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (dissenting opinion of Justice Stevens). In determining whether a race-based measure is narrowly tailored, courts consider factors such as the need for the measure, the efficacy of alternative measures, and the flexibility and duration of the measure. *See Paradise*, 480 U.S. at 171; *U.S. v. Secretary of HUD*, 239 F.3d at 219 (both discussing narrow tailoring in the context of remedial affirmative action plans).

At trial, the jury heard testimony from police officials that there was no rioting, looting, or other violence in the 70th Precinct itself following the Louima incident. Commissioner Safir testified that he believed the NYPD

had to act quickly to respond to the threat of violence, but rather than ordering immediate, temporary transfers, chose to enact permanent transfers through normal NYPD channels that took several weeks to take effect. (A. 461-62.) Plaintiffs' expert Dr. Leinen testified that the City could have more effectively responded to community concerns by assigning Creole-speaking Haitian-American officers and officers trained in police-community relations to the precinct. From this testimony, the jury could reasonably have concluded that the City had not demonstrated that the transfers were narrowly tailored to meet a compelling state interest.

Appellants contend that "common knowledge" regarding the "historical reality" of race relations in police work suffices to justify the City's actions. As noted above, strict scrutiny by this Court requires more than the assumption that a racial classification is an appropriate response to a state interest. "Argument in so sensitive an area of human relations must not . . . be allowed to draw on 'common sense,' which might be inflected by stereotypes." *Reynolds*, 296 F.3d at 526. Appellants have identified academic literature and case law supporting the general proposition that increased minority representation on a police force may improve police-community relations. (Appellant Br. at 39-42, (citing *Race as an Employment Qualification to Meet Police Department Operational Needs*, 54 N.Y.U. L. Rev. 413 (1979) and *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979))). However, it can scarcely be denied that in individual cases the assignment of minority officers to minority neighborhoods or to dangerous or otherwise unattractive tasks on the basis of their race may impede those very goals by decreasing the officers' willingness to serve on the police force, as well as their morale and self-

esteem. *See* (A. 394, 570, 624); *Young*, 608 F.2d at 693; *Baker*, 400 F.2d at 300, n. 9. The difficulty of balancing such competing interests underscores the need for particularized evidence of a compelling state interest.

Appellants also urge that the jury should not be allowed to "second guess" the Commissioner's decision to implement the transfers, since the decision was made in the context of the emergency situation following the brutalization of Abner Louima. Such unconditional deference to a government agent's invocation of "emergency" to justify a racial classification has a lamentable place in our history, *see Korematsu v. United States*, 323 U.S. 214, 223 (1944) (upholding internment of Japanese-Americans based on wartime security concerns), and we are not inclined to repeat the same mistakes today. *See Adarand*, 515 U.S. at 236, 244, 275 (Justice O'Connor for the Court, Justice Stevens in dissent and Justice Ginsburg in separate dissent, criticizing *Korematsu*); *see also* 50 U.S.C. App. § 1989.

There may indeed be occasions where race-conscious transfer of police officers is a constitutionally permissible means of improving law enforcement, whether as a long-term strategy to create a diverse police force, *see Barhold*, 863 F.2d at 238, or as an immediate response to an emergency situation. *See Wygant*, 476 U.S. at 314 (dissenting opinion of Justice Stevens); *Baker*, 400 F.2d at 300-01, n. 10. The jury concluded that this was not such an occasion. Since the evidence reasonably supported the jury's verdict, we conclude that the District Court correctly denied the motion for judgment as a matter of law.

B. Motion for a New Trial

We review a district court's decision on a motion for a new trial for abuse of discretion. *Song v. Ives Labs., Inc.*, 957 F.2d 1041, 1047 (2d Cir. 1992). The motion for a new trial "ordinarily should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *Atkins v. New York City*, 143 F.3d 100, 102 (2d Cir. 1998) (quoting *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 911 (2d Cir. 1997)). The City claims it is entitled to a new trial because 1) the jury charge on the "narrowly tailored" standard was erroneous; 2) the court's supplemental instructions "pushed" the jury to award damages to all plaintiffs; 3) the charge on emotional distress damages was prejudicially vague. In addition, the City contends that the damage award should be reduced to nominal amounts since plaintiffs failed to provide independent evidence of emotional distress. We find that the denial of the new trial motion was not an abuse of discretion.

"Narrowly Tailored" Jury Charge

The City did not object to the court's instruction on the "narrowly tailored" prong of the strict scrutiny test at trial. We therefore review the instruction for "fundamental error;" that is, an error "so serious and flagrant that it goes to the very integrity of the trial." *Shade v. Housing Auth. of New Haven*, 251 F.3d 307, 312-13 (2d Cir. 2001) (citations omitted). The trial court's instruction on "narrowly tailored" could not possibly have affected the integrity of the trial, since the jury, having determined that the City had failed to establish a compelling state interest, did not go on

to consider whether the transfers were narrowly tailored.[6] (A. 1195-96, 1373-74.) Any error in the instructions relating to this standard was harmless. *See United States v. Masotto*, 73 F.3d 1233, 1239 (2d Cir. 1996); *Richards v. City of Topeka*, 173 F.3d 1247, 1253 (10th Cir. 1999).

Prejudicial Effect of Supplemental Jury Charge

If the jury returns an inconsistent verdict, the trial judge has the discretion to resubmit the issues to the jury with a request for clarification. *See* Fed. R. Civ. P. 49(b) (court may either return the jury for further consideration of its answers to the interrogatories or order a new trial); *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 891 (2d Cir. 1988). Since the trial judge is in the best position to determine if a jury's answers are inconsistent, we review the decision for abuse of discretion. *See Kerman v. City of New York*, 261 F.3d 229, 244 (2d Cir. 2001). The trial judge initially concluded that the jury's award of $50,000 to each plaintiff was inconsistent with its finding that only one plaintiff had suffered an adverse employment action and the court's initial refusal to allow the jury to award damages for emotional distress unless the plaintiff showed physical manifestations. The court, however, then

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[6] As noted previously, the verdict sheet instructed the jury that in order to find a compelling state interest it had to conclude that the race-based transfers were "necessary to maintain effective law enforcement and to ensure public safety." We have considerable doubt that the instruction was proper, focusing as it did on the issue of whether the City had demonstrated that the transfers were "necessary," rather than whether the City had demonstrated a compelling state interest. Had the jury been given an instruction that avoided the question of necessity, it might well have reached a different verdict. However, as the City neither objected in the district court, nor raised the issue on appeal, we have no occasion to consider it.

relaxed the standard for proving emotional distress, allowing an award without a showing of physical manifestation if the plaintiff put forth evidence corroborating the claim. We find no error. Furthermore, we see no indication that the District Court "pushed" the jury in her supplemental charges to reach a certain verdict, especially since the jury returned essentially the same verdict after hearing the supplemental charges.

Emotional Distress Damages

"A jury charge is erroneous if it misleads the jury as to the correct legal standard, or if it does not adequately inform the jury of the law." *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 135 (2d Cir. 1999) (quoting *Hathaway v. Coughlin*, 99 F.3d 550, 552 (2d Cir. 1996)). In evaluating a jury charge, we look to the charge as a whole, and will reverse the jury verdict "only if we are persuaded 'that the error was prejudicial or the charge was highly confusing.'" *Time, Inc. v. Petersen Publ'g Co.*, 173 F.3d 113, 119 (2d Cir. 1999) (quoting *Warren v. Dwyer*, 906 F.2d 70, 73 (2d Cir. 1990)).

It is well-established that courts may award emotional distress damages in section 1983 cases. *Miner v. City of Glens Falls*, 999 F.2d 655, 662 (2d Cir. 1993). However, the mere fact that a constitutional deprivation has occurred does not justify the award of such damages; the plaintiff must establish that she suffered an actual injury caused by the deprivation. *See Carey v. Piphus*, 435 U.S. 247, 263-64 (1978). The damage award "must be supported by competent evidence concerning the injury." *Id.* at 264, n. 20. A plaintiff's subjective testimony, standing alone, is generally insufficient to sustain an award of emotional distress damages. *See, e.g., Cohen v. Bd of Educ.*, 728 F.2d

160, 162 (2d Cir. 1984); *Annis v. County of Westchester*, 136 F.3d 239, 249 (2d Cir. 1998). *Cf. Price v. City of Charlotte*, 93 F.3d 1241, 1254 (4th Cir. 1996). Rather, the plaintiff's testimony of emotional injury must be substantiated by other evidence that such an injury occurred, such as the testimony of witnesses to the plaintiff's distress, *see Miner*, 999 F.2d at 663, or the objective circumstances of the violation itself. *See id.*; *Walz v. Town of Smithtown*, 46 F.3d 162, 170 (2d Cir. 1995). Evidence that a plaintiff has sought medical treatment for the emotional injury, while helpful, *see, e.g., Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 581 (2d Cir. 1989), is not required. *Miner*, 999 F.2d at 663.

In *Annis*, we found that the plaintiff had failed to submit sufficient evidence to support emotional distress damages because

> the only evidence of [plaintiff's] emotional distress—her own testimony—is insufficient to warrant an award of compensatory damages for that injury. She has not alleged any physical manifestations of her emotional distress, and despite the discrimination she remained a lieutenant with the County police. She testified that she needs and has counseling, but introduced no affidavit or other evidence to corroborate her testimony. In short, her testimony fails to establish that she suffers from any concrete emotional problems.

136 F.3d at 249 (internal citations omitted). Judge Scheindlin relied on *Annis* in her original instruction to the jury that only those plaintiffs alleging physical

manifestations of emotional distress could recover for emotional distress damages in section 1983 cases. (A. 1184.) In her supplemental charge, she amended her instruction to state that emotional distress could be proved either by physical manifestations or by the plaintiff's testimony "corroborated by other testimony."

We agree that *Annis* should not be read to require physical symptoms of emotional distress in cases brought pursuant to 42 U.S.C. § 1983. While the district court's instructions on the issue could have been clearer, they were not so confusing or prejudicial to the City to warrant overturning the jury verdict.

Finally, the testimony at trial was sufficient to support the jury's damage awards. Having concluded that emotional distress damages were properly awarded, we may only reduce the award if the amount "shocks the conscience." *See, e.g., Walz*, 46 F.3d at 170; *Ismail v. Cohen*, 899 F.2d 183, 186 (2d Cir. 1990). In making this determination, we look to amounts awarded in similar cases. *Id.* The jury's award of $50,000 per plaintiff is well within the range of acceptable awards for emotional distress in civil rights cases. *See, e.g., Walz*, 46 F.3d at 170 (damages ranging from $20,400 to $40,800); *Phillips v. Bowen*, 278 F.3d 103, 111-12 (2d Cir. 2002) (damages of $400,000); *Hughes v. Patrolmen's Benevolent Ass'n of New York, Inc.*, 850 F.2d 876, 884 (2d Cir. 1988) (damages of $575,000).

CONCLUSION

We find that the jury could reasonably conclude from the evidence adduced at trial that plaintiff Espinal suffered an adverse employment action upon being

transferred to the 70th Precinct and that the City's race-based transfers violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The trial judge adequately instructed the jury on the applicable law and the damages awarded were not excessive. Accordingly, we affirm the judgment of the district court.

97 Civ. 7895 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INCORPORATED, for itself on behalf of its members, Police Officers Gary Johnson, Missie Lewis-Manning, Robert Drayton, Marva Gardner, Demetria Singleton, Margo McKenzie, Robert Winslow, Kenneth Zephrin, Oscar Espinal, Dave Guevara, Peggy Alves, Robin Irvin, Silas Plunkett, Ronny Forbes, Alton Walker, Barry Hinds, Tselanee Kitching, Laverne Stuger, Michael Butler, Carole P. Sievwright, Inger Barron, and Ronald S. Archer,

Plaintiffs,

-against-

THE CITY OF NEW YORK, Rudolph Giuliani, as Mayor of the City of New York and individually, Howard Safir, as Police Commissioner of the City of New York and individually, New York City Deputy Police Chief Patrick Brennan, officially and individually, Deputy Police Chief Cornelius J. Dever, officially and individually, Chief Michael A. Markman, officially and individually, Patrick J. Kelleher, First Deputy Commissioner, officially and individually, Sgt. Deborah Peters, of the Patrol Borough Chief's Office, individually and in her official capacity, Patrol Chief Wilbur Chapman, individually and in his official capacity,

Defendants.

OPINION AND ORDER

Joan M. Cresap, Trager, Cronia & Byczek, L.L.P, Lake Success, NY, for Plaintiffs.

Donald Sullivan, Assistant Corporation Counsel, New York City, for Defendants.

SCHEINDLIN, District Judge.

September 17, 1999

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I. Introduction

The Patrolmen's Benevolent Association of the City of New York ("PBA"), brings this employment discrimination action against defendants, the City of New York and the New York City Police Department ("NYPD"), on behalf of itself and twenty-two black and black-Hispanic police officers who were involuntarily transferred to the 70th Police Precinct in August 1997, following the torture and beating of Abner Louima.[1] Plaintiffs allege that defendants' consideration of their race, color and national origin in deciding to transfer them from one precinct to another violated the equal protection clause of the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 et seq., as amended, 42 U.S.C. §§ 1981, 1983 and 1985 and the New York State Human Rights Law. Plaintiffs seek monetary damages and injunctive relief. Defendants do not dispute that race was the basis for the transfer decision. Rather, defendants argue that their actions were justified by exigent circumstances in the community patrolled by the 70th Precinct.[2]

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[1] Plaintiffs are employed by the New York City Police Department and are members of the PBA, the union which is the official bargaining unit for New York City police officers. Defendants are high-level employees of the New York City Police Department. The parties have stipulated to the dismissal of all claims against Mayor Giuliani and Sergeant Deborah Peters in their individual capacities.

[2] The 70th Precinct serves a community that is 40% black, 38% white, 14.3% Hispanic and 6.9% Asian. *See* Letter of Jacob Silver, Staff Attorney, NYPD Legal Bureau to the Equal Employment Opportunity Commission ("EEOC"), January 30, 1998, Ex. K to the Joint Exhibits for Cross-Motions for Partial Summary Judgment. (All alphabetical

Defendants now move for partial summary judgment on plaintiffs' equal protection claim, asserting that "operational needs" is a legally cognizable defense to claims of improper race-based transfers of police officers. Defendants also move to dismiss plaintiffs' Title VII claim, alleging that plaintiffs have failed to allege an adverse employment action. Plaintiffs have cross-moved for summary judgment on their equal protection claim, contending that defendants' transfer decision was not narrowly tailored to meet a compelling state interest. In addition, plaintiffs have moved for partial summary judgment on their Title VII claim to exclude certain defenses to that claim.

The facts of this case are unique. Never before has the New York City Police Department resorted to race-based transfers of police officers in response to a crisis. At the outset, it is also important to note that:

> [a] discussion of the police function is essentially a description of one of the basic functions of government, especially in a complex modern society where police presence is pervasive. The police function fulfills a most fundamental obligation of government to its constituency.

Foley v. Connelie, 435 U.S. 291, 297, 98 S.Ct. 1067, 55 L.Ed. 2d 287 (1978) (New York statute requiring U.S. citizenship for members of state police force did not violate the equal protection clause under rational relationship test). Moreover, the legal issues involved are singular. The

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exhibits refer to the Joint Exhibits for Cross-Motions for Partial Summary Judgment).

legality of a municipal program to improve law enforcement efforts by adopting a race-conscious hiring or promotion program is typically challenged by white applicants alleging "reverse discrimination" in violation of the equal protection clause or Title VII. *See, e.g., Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992) (white male denied acceptance in police recruit class challenged affirmative action plan that resulted in hiring of minority and female applicants with lower examination scores); *Peightal v. Metropolitan Dade County*, 940 F.2d 1394 (11th Cir. 1991) (white male denied position as firefighter challenged affirmative action plan that resulted in hiring of 57 minority or female applicants with lower examination scores); *Fountain v. City of Waycross*, 701 F. Supp. 1570 (S.D. Ga. 1988) (white officer ranked first on promotion list challenged affirmative action plan that was used to promote black officer ranked seventh). Here, however, minority plaintiffs allege that they were victimized by the NYPD's race-based transfer program, intended to improve police/community relations in minority neighborhoods.

II. Background

On August 9, 1997, Abner Louima, a black man of Haitian national origin, suffered a brutal beating and sexual torture at the hands of several white police officers within the confines of the 70th precinct station house in Brooklyn, New York. A meeting at New York City Police Headquarters was convened two days later in response to the incident. In attendance were Mayor Rudolph W. Giuliani, Police Commissioner Howard Safir, other police officials, members of the clergy and community leaders, including New York City Council Member Una S.T. Clarke. *See* Defendants' Local Civil Rule 56.1 Statement of Undisputed Facts ("Defs.' 56.1") ¶ 3. Councilwoman

Clarke is the elected City Councilwoman from New York City's 40th District, Brooklyn. Her jurisdiction includes precincts 67, 70 and 71. Following that meeting, Commissioner Safir decided to deploy more black police officers to the 70th precinct. *See* Deposition of Commissioner Safir, February 5, 1999 ("Safir Dep."), Ex. A, at 54.

On August 12, reports of the Louima incident began to appear in the media. The next day, the first of several demonstrations, involving thousands of protestors, was held at the 70th Precinct. Defs.' 56.1 ¶ 9. Police and city officials became concerned that these demonstrations might result in violence. Defs.' 56.1 ¶¶ 10, 11. As a result, on August 14, five days after the Louima incident, Mayor Giuliani and Commissioner Safir publicly announced that the Commanding Officer and Executive Officers of the 70th precinct, both of whom were white, as well as ten police officers assigned to that precinct, would be immediately reassigned. Defs.' 56.1 ¶ 12. In their place, Raymond Diaz, who is Hispanic, was quickly appointed Commanding Officer, and George Clouden, who is black, was named Captain. Defs.' 56.1 ¶ 12.

On August 16, seven days after the Louima incident, approximately ten or twelve police officers, of whom approximately half were black, were transferred into the 70th Precinct. Defs.' 56.1 ¶ 14. On August 19, eight days after making the decision to transfer black officers into the precinct, Commissioner Safir announced that minority police officers would be transferred into the 70th precinct, and that the City would recall the Haitian-American police officers who had been on a leave of absence to Haiti to help reform the notoriously brutal

Haitian police force. Defs.' 56.1 ¶ 16.[3] Also on the 19th, the Mayor created a task force on New York City Police/Community Relations. Defs.' 56.1 ¶ 17.

On August 25, two weeks after Commissioner Safir's decision to deploy black officers, approximately twenty-seven police officers within the Command known as patrol borough Brooklyn South—including all of the plaintiffs—were involuntarily transferred to the 70th precinct. All twenty-two plaintiffs transferred on August 25 are black and identify themselves as African-American, Black-Hispanic, Jamaican, West-Indian, Trinidadian or Guyanese. Pls.' 56.1 ¶¶ 12-54.[4]

On August 29, a rally and demonstration protesting the Louima incident began at Grand Army Plaza in

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[3] Commissioner Safir stated: "I think we need to move some more Haitian police officers into the Seven-O who can relate to that portion of the community that is Haitian." John Kifner, *Officers Assigned to Haiti Are to Join 70th Precinct*, N.Y. Times, August 20, 1997, B3, Ex. N. There are approximately 200 Haitian-American officers in the NYPD. *See* Deposition of Yvann Pierrelouis, Carribean Liaison, NYPD Community Affairs Office, Sept. 17, 1998 ("Pierrelouis Dep."), Ex. H, at 9.

[4] The NYPD transferred a total of 44 employees *into* the 70th precinct between August 9, 1997 and September 19, 1997. Of those 44, 9 were supervisors and 35 were police officers. Of the supervisors, 4 are black, 4 are white and one is Hispanic. Of the police officers, 27 are black, 2 are white and 6 are Hispanic. *See* Report of Investigating Officer Sergeant S.W. St. James, NYPD Office of Equal Employment Opportunity, Oct. 17, 1997, Ex. N, 1.

During that same period, a total of 24 transfers were made *out* of the 70th precinct. Of those 24, 4 were white supervisors. Of the 20 police officers, one was black, 14 were white, 4 were Hispanic and one was Asian. *See id.* at 2.

Brooklyn and continued over the Brooklyn Bridge to City Hall. Demonstration organizers notified police and city officials at least ten days in advance of their intention to hold the rally. Defs.' 56.1 ¶ 15. Following the rally, a number of individuals were arrested in Brooklyn and charged with disorderly conduct. Defs.' 56.1 ¶ 24. Demonstrations continued to occur outside the 70th precinct station house for several days after the August 29 rally. Defs.' 56.1 ¶ 25. On October 23, 1997, less than one month after their involuntary transfer, plaintiffs filed the instant action.[5]

III. Legal Standard for Summary Judgment

A motion for summary judgment may be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *accord Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426, 436 (2d Cir. 1999). When considering a motion for summary judgment, the court must draw all factual inferences and resolve all ambiguities in favor of the nonmoving party. *See id.* The moving party has the burden of identifying the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986); *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997). This is true even though the court is presented with cross-motions for summary judgment. Each movant has the burden of

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[5] Nine plaintiffs filed administrative charges with the EEOC shortly after their transfer and received right-to-sue letters. *See* Amended Complaint, Ex. Q, ¶¶ 10-16.

presenting evidence to support its motion. *See Barhold v. Rodriguez*, 863 F.2d 233, 236 (2d Cir. 1988).

IV. Discussion

A. Plaintiffs' Equal Protection Claim

The equal protection clause of the Fourteenth Amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." The individual rights guaranteed by the Fourteenth Amendment are not absolute; they must be balanced against the state's interest. "[w]hen a State's ... imposition of burdens hinges on ... the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest." *University of California Regents v. Bakke*, 438 U.S. 265, 320, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

Governmental classifications based on race are inherently suspect under the equal protection clause and subject to strict judicial scrutiny. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L.Ed.2d 158 (1995); *Richmond v. J.A. Croson*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). To satisfy a strict scrutiny analysis, a race-based classification must promote a compelling governmental interest and be "narrowly tailored" to meet that interest. *In re Griffiths*, 413 U.S. 717, 721-22, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973). Although race-based actions merit the highest judicial scrutiny, the Supreme Court has emphasized that it wishes "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand*, 515 U.S. at 237, 115 S.Ct. 2097 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980)(Marshall, J.,

concurring in judgment)). Accordingly, it is possible for a race-based classification to survive this standard of review.

1. "Operational Needs" May Constitute A Compelling State Interest

Defendants move for summary judgment on the issue of whether a police department's "operational needs" may constitute a compelling state interest.[6] Resolving the issue of whether such an "operational needs" defense is legally cognizable does not mean that the facts of this case automatically fall within any such defense. Indeed, the burden of proving whether the circumstances present in the 70th Precinct during August 1997 justify an operational needs defense rests with defendants.

The need to integrate a police force, under certain circumstances, can meet the compelling state interest requirement of the strict scrutiny test. Typically, a compelling governmental interest results from the need to remedy past discrimination by the police department. *See, e.g., Bridgeport Guardians v. Members of The Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333, 1341 (2d Cir. 1973) (approving hiring quotas for minority police officers on grounds of past discrimination and noting that "visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement"); *Detroit Police Officers' Assoc. v. Young*, 608 F.2d 671 (6th Cir.

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[6] This argument is raised as a defense to plaintiffs' equal protection challenge, rather than as a defense to a Title VII violation. As discussed later in this opinion, Title VII provides its own separate defenses which include exceptions for a bona fide occupational qualification and for affirmative action plans.

1979) (uncontroverted evidence of historical racial discrimination by police department justified voluntary affirmative action program). To succeed on a traditional "operational needs" defense, defendants must show a compelling governmental interest by establishing: (1) that discrimination against the black community has characterized law enforcement in the past; (2) that this discrimination has engendered hostility between black community members and the police; and (3) this hostility has made law enforcement in the community ineffective. *See Race as an Employment Qualification to Meet Police Department Operational Needs*, 54 N.Y.U. L.Rev. 413, 427 (1979)(hereinafter *"Race as an Employment Qualification"*). However, defendants here do not rely on the theory of past discrimination to justify their operational needs defense.

Rather, relying on portions of Justice Lewis Powell's opinion in *Bakke*, defendants suggest that race-conscious decisions can survive strict scrutiny for reasons other than curing the ill effects of past discrimination. *See Bakke*, 438 U.S. at 313, 98 S.Ct. 2733 (goals of creating diverse student body and providing health care to underserved communities characterized as compelling governmental interests). Defendants argue that despite the absence of past discrimination, the NYPD's responsibility to reestablish effective law enforcement after it has been impaired by community hostility provides an equally compelling state interest. This particular issue is one of first impression in this Circuit. Courts in other circuits, however, have been willing to consider the need for effective law enforcement, absent evidence of past discrimination, as a sufficiently compelling governmental interest.

In *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), the Seventh Circuit held that a county prison's rejection of three white correctional officers, in favor of a black applicant, for the position of prison boot-camp lieutenant did not violate the equal protection clause. Instead of limiting the use of race-based hiring to curing the ill effects of past discrimination, the court found another compelling interest in hiring the black lieutenant:

> The black lieutenant is needed because inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp. This is not just speculation, but is backed up by expert evidence that the plaintiffs did not rebut. The defendants' experts—recognized experts in the field of prison administration—did not rely on generalities about racial balance or diversity; did not, for that matter, defend a goal of racial balance. They opined that the boot camp in Greene County would not succeed in its mission of pacification and reformation with as white a staff as it would have had if a black male had not been appointed to one of the lieutenant slots.

Wittmer, 87 F.3d at 920. *But see McNamara v. City of Chicago*, 138 F.3d 1219 (7th Cir.), *cert. denied*, _ U.S. _, 119 S. Ct. 444, 142 L. Ed. 2d 398, (1998) (declining to extend compelling interest found in *Wittmer* to firefighting due to insufficient evidence that white firefighters may lack credibility and be denied cooperation in minority neighborhoods).

In *Talbert v. City of Richmond*, 648 F.2d 925, 931-932 (4th Cir. 1981), the Fourth Circuit followed Justice Powell's analysis in *Bakke* and reversed a district court's finding that a police department's consideration of race in denying promotion to a white officer violated the equal protection clause. In *Talbert*, the City claimed that it used race as a factor in promoting minorities to the top ranks of the police department in order to "advance the operational needs of the police department by achieving diversity.... It viewed such diversity as important to effective law enforcement in a city whose population was approximately 50% black." *Talbert*, 648 F.2d at 928.

While the issue is one of first impression in this Circuit, the operational needs defense was alluded to, albeit in a different context, in *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988). There, the court noted in dicta that when statistical evidence appeared insufficient to support a history of past discrimination by the New York State Division of Parole, the District Court could have considered a "second possible compelling state interest" that of an "operational need of the Division for a balanced workforce." *Id.* (citing *Talbert*, 648 F.2d at 928-29).[7] The Second Circuit defined "operational need" as "a law enforcement body's need to carry out its mission effectively, with a workforce that appears unbiased, is able to communicate with the public and is respected by the community it serves." *Barhold*, 863 F.2d at 238.

Here, defendants assert that the minority community's distrust of the NYPD was heightened by the Abner Louima incident and could have resulted in a

[7] Neither of the parties in B*arhold* effectively advanced an "operational needs" argument.

collapse of the social order, such as the violence which erupted in Crown Heights following the murder of Yankel Rosenbaum[8] and in Los Angeles following the announcement of the verdict in the Rodney King case. The crux of defendants justification stems from a theory espoused in a law review article:

> A predominantly white police force may face a serious barrier to its law enforcement activities in the hostility of members of the white community. Black hostility toward the police may arise from distrust of the white establishment, whose power and authority the police symbolize; racist attitudes and practices by white police officers; or past discrimination by the municipality in the provision of law enforcement services to black residents. This hostility can be expressed in a variety of ways, from passive non-cooperation with police investigative efforts to active rejection of the rule of law; in its most extreme form, hostility can be manifested in mass rioting or widespread looting and random violence.

Race as an Employment Qualification, 54 N.Y.U. L.Rev. at 413-14. *See also*, National Advisory Comm'n on Civil

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[8] On August 19, 1991, in the Crown Heights neighborhood of Brooklyn, New York, a seven-year-old black child was killed when struck by an out-of-control automobile which was part of an entourage of Jewish community figures. Later that night, in an act of retaliation, a group of black youths stabbed and killed a Jewish man. Days of looting, arson and rioting followed. The NYPD did not transfer any Jewish officers into Crown Heights during that crisis, nor has it made minority-based transfers during any other crisis. *See* Safir Dep. at 64.

Disorder, Report 9-11, 299 (New York Times ed. 1978) (the "Kerner Commission") ("We have cited deep hostility between police and . . . communities as a primary cause of the disorders surveyed by the Commission. . . . [I]n practically every city that has experienced racial disruption since the summer of 1964—abrasive relationships between police and [blacks] have been a major source of grievance, tension and, ultimately, disorder.").

Based on this reasoning, defendants argue that there was an operational need to transfer white officers out of—and black officers into—the 70th Precinct to restore community confidence:

> [W]e discussed the issue that this was an emergency situation, that we believed and I believed that there was great potential for civil disturbance and we needed to very quickly and very expeditiously calm the community and make sure that the community understood that we took this incident very seriously, that we were not going to cover it up, that we were not going to let it go unnoticed and we were going to take very firm and decisive action.

Safir Dep. at 56-57.

Upon careful consideration, it is my conclusion that the need for effective law enforcement can be a compelling state interest. In order to carry out its mission effectively, a police force must appear to be unbiased, must be respected by the community it serves and must be able to communicate with the public. Thus, a police department's "operational needs" can be a compelling state interest

which might justify race-based decision making. However, defendants bear the burden of proving at trial that this compelling state interest actually existed in light of the circumstances in the 70th Precinct during and after August 1997.[9] Thus, in order to prevail on this defense, defendants must demonstrate, at trial, that community hostility towards the NYPD following the Louima incident compromised the goal of effective law enforcement and that race-based transfers would restore that goal.

2. Whether Action Was "Narrowly Tailored" Remains Disputed Question of Fact Precluding Summary Judgment

Once a compelling state interest has been established, defendants must satisfy the second prong of the strict scrutiny test by showing that the transfers were

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[9] Plaintiffs disagree that the potential for violence was as serious as that described by defendants. For example, there were no incidents of civil unrest in any demonstrations prior to August 29. *See* Safir Dep. at 73-75. "As far as I know, there were no physical injuries nor property damage. . . . If there were demonstrations, they were peaceful." Deposition of Michael Markman, Chief of Personnel Bureau, Jan. 21, 1999 ("Markman Dep."), Ex. E, 71; *see also* Community Affairs Worksheets of Officer Corlis Smith, Ex. M (reporting "no incidents" of community unrest despite presence of hundreds of demonstrators on Aug. 16, 17 and 23). On August 23, the newly-appointed 70th Precinct Commanding Officer Raymond Diaz noted that a "planned peaceful demonstration" of 100 persons occurred outside the 70th Precinct. A total of 258 officers were on hand. There were no arrests and "the group dispersed without incident." *See* Memorandum from C.O. Diaz to Chief of Patrol, Aug. 23, 1997, Ex. L. In fact, there were no arrests or violent incidents other than the arrests made during the August 29 march. On August 29, Community Affairs Officer Corlis Smith reported that the demonstration attracted approximately 6,000 attendees. Of those, approximately 100 were arrested for "attempting to impede traffic." Worksheet, August 29, 1997, Ex. M.

"narrowly tailored" to meet that interest. Plaintiffs now move for summary judgment on their equal protection claim, seeking a ruling that defendants' action was not narrowly tailored. Under the criteria set forth by the Supreme Court in *United States v. Paradise*, 480 U.S. 149, 171, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1986), to determine whether a plan is narrowly tailored, a court must look to the "necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." Here, defendants must demonstrate that their decision to transfer officers because of their race was necessary to achieve a compelling state interest and that there was no less burdensome alternative.[10] For example, in *Barhold*, the Court Of Appeals agreed with the district court's conclusion that a New York State Parole Division affirmative action plan was narrowly tailored to achieve its goals of increasing female and minority representation. There, the Parole Division designed the plan

> as a temporary measure; in fact, the Division modified it after only four months because of its effectiveness. The plan as modified is flexible, with affirmative action being only one of several factors that may be taken into

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[10] Moreover, assuming that exigent circumstances immediately following the Louima incident provided a compelling state interest to justify the swift transfer of officers based on their race, defendants must then prove that once the emergency situation subsided, the continued presence of the transferred officers in the 70th Precinct remained necessary to achieve the purported compelling state interest and that there is no less burdensome alternative.

> consideration. . . . The plan does not set quotas. . . . Finally, the impact on third parties has not been excessive and the interests of White males have not been unnecessarily trammeled.

Barhold, 863 F.2d at 238.

a. Flexibility and Duration

Limiting the duration of a race-conscious remedy is a keystone of a narrowly tailored plan. *See, e.g., United Steelworkers v. Weber*, 443 U.S. 193, 215, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979)(program "operates as a temporary tool for remedying past discrimination"; "the duration of the program is finite") (Blackmun, J., concurring in judgment), *reh'g denied*, 444 U.S. 889, 100 S.Ct. 193 62 L. Ed. 2d 125 (1979); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273, 106 S. Ct. 1842, 90 L. Ed.2d 260 (1986)(citing *Fullilove*, 448 U.S. at 480, 100 S. Ct. 2758); *Detroit Police Officers Assoc. v. Young*, 989 F.2d 225, 228 (6th Cir. 1993); 3 Lex K. Larson, *Employment Discrimination* § 63.06[3] (2d ed. 1999) (hereinafter "*Larson*"). In the instant case, unless officers may request and obtain transfers out of the Precinct, the defendants' transfer decision is perpetual and inflexible, rather than of limited duration.

Defendants maintain that the transfers were not permanent and that any officer who desired a transfer elsewhere was free to make a request. Defendants argue that to the extent plaintiffs remain assigned to the 70th Precinct it is because they did not request a transfer. Those officers who did seek a transfer "were permitted to do so as long as the assignment they desired was available and appropriate." Defendants' Memorandum In Support of

Motion for Partial Summary Judgment ("Defs.' Mem.") at 16. For example, plaintiff Oscar Espinal transferred out of the 70th Precinct within weeks of his involuntary transfer. In contrast, plaintiffs proffer evidence that they have not been afforded the opportunity to transfer out of the Precinct. *See* Pls.' 56.1 ¶ 116. According to plaintiffs, Officer Gary Johnson was advised by his commanding officer, Raymond Diaz, that he could not transfer out. *See* Affidavit of Plaintiff Gary Johnson, April 26, 1999 ("Johnson Aff."), Ex. X, ¶ 17. In addition, the amended complaint alleges that both officers Dave Guevera and Michael Butler requested a transfer out of the 70th Precinct, but their requests were either denied, not processed, or deleted. *See* Amended Compl., Ex. Q, ¶¶ 142, 152.[11] The ability of the officers to meaningfully request and receive transfers is a disputed issue of fact that must be resolved at trial.

b. Efficacy of Alternative Remedies

As for the efficacy of alternative remedies, defendants contend that during the crisis, the City did not have the time to implement other remedial programs such as race-conscious hiring or sensitivity training. The NYPD had, at most, two to three weeks to act before the rally planned for August 29 and the subsequent daily rallies. The crisis situation may have prevented the NYPD from conducting a thorough analysis of long-term strategies to improve community relations within the 70th Precinct.

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[11] Defendants also contend that their transfer decision was narrowly tailored because, in order to minimize disruption caused by extra commuting time, the transferred officers came from contiguous precincts within the command known as Patrol Borough Brooklyn South.

However, two years have now passed since the crisis both erupted and subsided. Plaintiffs argue that, in the interim, the City has had time to develop and implement other remedial actions such as race-based hiring or sensitivity training. Thus, it is not clear whether concerns for public safety continue to justify race-based involuntary transfers to the exclusion of other remedies.

More important, however, in considering the efficacy of the remedy, is plaintiffs' contention that the transfer decision could not have been narrowly tailored because the assignment of officers on the basis of their race, failed to satisfy the goals set out by the Police Commissioner. At his deposition, Safir specifically acknowledged the need for Creole-speaking officers who could be sensitive to the needs of the community. *See* Safir Dep. at 59-60; Pierrelouis Dep. At 12-13, 17-22. Safir advised the press and community members at Police Plaza that he intended to transfer Haitian police officers to the 70th Precinct. *See* Safir Dep. at 82. Although a list of Haitian and "Creole speaking" officers was available to the NYPD, Safir declined to transfer those individuals. *See* Safir Dep. at 60, Pierrelouis Dep. at 19-22. The ultimate transfer decision was based on race -- not language skills, Haitian national origin, job skills or the sensitivity of any particular officers. *See* Safir Dep. at 83-88; Markman Dep. at 81-88.[12] In addition to their race, plaintiff officers were chosen because they were "good" officers and tended to be more junior in status. *See* Deposition of Deputy Inspector

[12] Plaintiffs question defendants' good faith in this and other respects, including the fact that despite Safir's acknowledgment of an immediate need for the transfers, they did not occur until three weeks after his announcement. *See* Safir Dep. at 63.

Edward Hayes, January 13, 1999 ("Hayes Dep."), Ex. S, 19-20.

Indeed, Safir acknowledged that alternatives did exist. The NYPD could have immediately deployed black police officers or detectives to the 70th Precinct on a temporary basis within hours of the tragic event. *See* Safir Dep. at 78. For example, in response to the rioting in Crown Heights in August 1991, the NYPD immediately dispatched additional officers and community affairs assistants on a temporary basis. *See* Safir Dep. at 63-64. However, Chief Markman distinguished the Crown Heights incident, explaining that Crown Heights involved tension between the Jewish community and the black community, not tension between the community and the NYPD arising from an incident of white police violence against black victims. *See* Markman Dep. at 132. Similar to the issues of flexibility and duration, whether viable less-burdensome alternatives existed remains a disputed issue for the trier of fact.

Whether defendants' transfer decision was narrowly tailored requires the resolution of material issues of fact including those set forth above. Accordingly, plaintiffs' motion for partial summary judgment on this issue is denied.

B. Plaintiffs' Title VII Claim

Title VII makes it unlawful for an employer to discriminate against any individual with respect to the "compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In addition, Title VII forbids an employer to

"limit" or "segregate" its employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee," because of such individual's race, color, or national origin. 42 U.S.C. § 2000e-2(a)(2). Plaintiffs' discrimination claim is based on a theory of disparate treatment, namely that in transferring black officers into the 70th precinct on the basis of their race, defendants treated members of a protected class less favorably than white persons.[13]

Plaintiffs move for partial summary judgment on their Title VII claim, seeking to preclude defendants from asserting certain defenses to this claim. Defendants, in turn, cross-move for summary judgment on the Title VII claim, arguing that plaintiffs are unable to establish that their involuntary transfer constitutes an "adverse employment action" under Title VII.

1. Legal Analysis Applicable To Cases Involving Direct Evidence of Discrimination

Discriminatory treatment is established under Title VII when plaintiffs prove they were treated less favorably than others solely because of their race, color, religion, sex or national origin. "Proof of discriminatory motive is critical." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 52 L.Ed.2d

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[13] Defendants take pains to note, and I agree, that this case is not one involving disparate impact. Disparate impact cases, as opposed to disparate treatment cases, involve neutral employment policies that have the unintended effect of discriminating against individuals who belong to a protected class. *See, e.g., Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 645-46, 109 S. Ct. 2115, 104 L.Ed.2d 733, (1989).

396 (1977). Motive can be established by circumstantial as well as direct evidence. *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714 n.3, 103 S.Ct 1478, 75 L.Ed.2d 403 (1983). Normally, discriminatory treatment is proven pursuant to the three-part test established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and elaborated upon in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 67 L.Ed.2d 207 (1981). Under the *McDonnell Douglas/Burdine* framework, plaintiff must first establish a prima facie case of discrimination. If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for its employment decision. Then, assuming the defendant articulates a non-discriminatory reason, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for the true motive which is discriminatory. *See McDonnell Douglas*, 411 U.S. at 802. Defendants assert that plaintiffs have failed to establish a prima facie case.[14]

Where there is direct evidence that race was the motivating factor, "The *McDonnell Douglas* search for a motive is unnecessary and therefore inapplicable." *Johnson v. State of New York*, 49 F.3d 75, 79 (2d Cir. 1995) (employer's mandatory age-dependent retirement policy constituted direct evidence that plaintiff's discharge was based on age) (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d

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[14] Defendants back away from this assertion in their reply brief, stating that the *McDonnell Douglas* analysis "has little application in this matter". Defendants' Reply Memorandum in Support of Motion for Partial Summary Judgment ("Defs.' Reply Mem.") at 4.

523 (1985)). "As should be apparent, the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (O'Connor, J., concurring in judgment). *Price Waterhouse* advanced the following test applicable to cases of intentional discrimination where direct evidence is available. Once an employee has adduced direct evidence of disparate treatment on the basis of race, she has made out a prima facie case of intentional discrimination. The burden of persuasion then shifts from the employee to the employer, who must rebut the direct evidence of discrimination by affirmatively proving that it would have made the same decision even if it had not taken race into account. *See Price Waterhouse*, 490 U.S. at 242, 109 S.Ct. 1775 (plurality opinion). The test set out in *Price Waterhouse*, however, is also inapplicable because defendants concede that their decision was based on race and they would not have made the same decision absent race.

Despite defendants' concession that race was the motivating factor behind the employment action, the ultimate burden of proving a Title VII violation remains with the plaintiffs. That burden includes proving by a preponderance of the evidence, as in any other Title VII case, that plaintiffs' involuntary transfer constitutes an adverse employment action.

2. Issue of Whether Transfer Was An Adverse Employment Action Precludes Summary Judgment

Defendants argue that plaintiffs' transfer cannot, as a matter of law, constitute an adverse employment action

because plaintiffs' rank, salary, benefits and duties were the same both before and after the transfer.

a. What Constitutes An "Adverse Employment Action"

As set forth above, Title VII prohibits employers from discriminating with respect to "compensation, terms, conditions, or privileges of employment, because of [an] individual's ... race, ... or to limit, segregate, or classify [its] employees ... in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ... race." 42 U.S.C. § 2000e-2(a). Accordingly, our court of appeals has held that the plain language of the statute makes abundantly clear that "the protections provided by Title VII are not limited to 'instances of discrimination in pecuniary emoluments.'" *de la Cruz v. New York City Human Resources Admin. Dep't of Social Servs.*, 82 F.3d 16, 21 (2d Cir. 1996) (quoting *Rodriguez v. Bd. Of Educ.*, 620 F.2d 362, 366 (2d Cir. 1980)). "Recognizing that job discrimination may take many forms, Congress cast the prohibitions of Title VII broadly to include subtle distinctions in the terms and conditions of employment as well as gross salary differentials based on forbidden classifications." *Rodriguez*, 620 F.2d at 364.

Indeed, the Second Circuit has found that lateral transfers, without any resulting loss of salary, may constitute an adverse employment action for the purposes of Title VII. In *de la Cruz*, for example, plaintiff's lateral transfer from the Department of Social Service's Adoption Unit to the Foster Care Unit constituted an adverse action sufficient to satisfy plaintiff's prima facie case of national origin discrimination and to prevent summary judgment in

favor of his employer. Plaintiff de la Cruz contended that his employer

> moved him from an "elite" Division of DSS, which provided prestige and opportunity for advancement, to a less prestigious unit with little opportunity for professional growth. [Defendants] argue that the two units are equal in status. Although de la Cruz's case is in this respect quite thin, the transfer arguably altered the terms and conditions of his employment in a negative way.

de la Cruz, 82 F.3d at 21. Similarly, in *Rodriguez*, the Second Circuit reversed the dismissal of a Title VII action brought by a junior high school art teacher who had been involuntarily transferred to an elementary school in the same school system. Her employer maintained that the transfer would "not diminish her salary; does not and will not reduce her benefits, her seniority rights, or add any increased load to her work performance. The difference is in the site of her work and the age of her pupils." *Rodriguez*, 620 F.2d at 365. Rodriguez, however, contended that the transfer decision was motivated by her sex and effectively represented "a demotion that would constitute a serious professional setback and stigma to her career." *Id.* The District Court sided with the employer stating that the teacher's action "cannot survive dismissal merely because plaintiff seeks to assuage hurt feelings and injured pride." *Id.* In reversing, the second circuit noted the district court's recognition that the transfer caused plaintiff "severe professional ... trauma" due to the profound difference in art programs geared to students in elementary school as opposed to junior high school. "This radical change in the nature of the work Dr. Rodriguez was called

upon to perform constitutes interference with a condition or privilege of employment adversely affecting her status within the meaning of the statute." *Id.* at 366.

"Adverse actions include a decision that 'has an attendant negative result, a deprivation of a position or an opportunity.'" *Meckenberg v. New York City Off-Track Betting*, 42 F.Supp.2d 359, 377 (S.D.N.Y. 1999) (female employee's subjective dissatisfaction alone does not render denial of requested transfer legally cognizable adverse employment action under Title VII; however, issue of fact regarding whether working conditions were objectively unfavorable would preclude summary judgment) (quoting *Medwid v. Baker*, 752 F.Supp. 125, 136-37 (S.D.N.Y. 1990) (whether plaintiff's transfer to identical position out-of-state was adverse employment action under ADEA precluded summary judgment in favor of employer; plaintiff alleged that transfer posed undue hardship on family and resulted in diminution in work assignments)); *see also Sprott v. Franco, Chair New York City Hous. Auth.*, 94 Civ. 3818, 1997 WL 79813, *13 (S.D.N.Y. Feb. 25, 1997)(issue of fact whether plaintiff's transfer was adverse employment action; because "[e]ven if a transfer does not result in a reduction in salary, benefits, or civil service rank, it may be considered adverse when the employer moves the employee's office to an undesirable location")(citing *Monica v. New York City Off-Track Betting*, 93 Civ. 6371, 1995 WL 117879, *4 (Mar. 17, 1995), *aff'd*, 100 F.3d 941 (2d Cir. 1996)).

Nevertheless, "not every unpleasant matter short of [discharge or demotion] constitutes an adverse employment action." *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997) (quoting *Welsh v. Derwinski*, 14 F.3d 85, 86 (1st Cir. 1994)); *see also Garber v. New York*

City Police Dep't, 95 Civ. 2516, 1997 WL 525396, *7 (S.D.N.Y. Aug. 22, 1997), *aff'd*, 97-9191, 1998 WL 514222, *3 (2d Cir. June 12, 1998) (plaintiff's subjective "unhappiness" over transfer decision not enough to constitute adverse employment action); *Bunis v. Runyon*, 94 Civ. 2063, 1997 WL 639241, *3-4 (S.D.N.Y. Oct. 16, 1997) (plaintiff's subjective feelings about denial of shift-change request not enough to transform denial into adverse employment action within meaning of Title VII). *See also Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) ("Obviously, a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do either.").

"Because there are no bright-line rules, courts must pore over each case to determine whether the challenged employment action reaches the level of 'adverse'." *Wanamaker*, 108 F.3d at 466. In addition, because job discrimination can take many forms, courts are not limited as to the job conditions that may be considered in determining whether a particular employment action is materially adverse. *See, e.g., Crady v. Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993) (suggesting non-exclusive list of factors and noting that courts should consider "other indices that might be unique to a particular situation"). The key inquiry regarding involuntary transfers is whether the transfer constitutes a "negative employment action tantamount to a demotion." 1 *Larson* § 12.08[2] at 12-82 (citing *Keeley v. Citibank*, 711 F.Supp. 157 (S.D.N.Y. 1989) (factual dispute as to whether transfer was a demotion precluded summary judgment)).

b. Facts At Issue

Plaintiffs acknowledge that their positions in the 70th Precinct are essentially the same as their previous positions with respect to job responsibilities and compensation.[15] *See* Johnson Aff. ¶ 6. Plaintiffs do complain, however, that their status as officers has been lowered by placement both in a new Precinct and in this particular Precinct. First, plaintiffs allege that transfer to a new Precinct is akin to "starting over" as an officer, resulting in lost promotion opportunities. While some plaintiffs were rookies at the time of the transfer, others had been officers for between five and twelve years. *See id.* ¶ 18. The officers allege that their long-term professional relationships in their previous precincts would have played an important role in receiving future promotions or details. *See id.* ¶ 14. These opportunities were severed by placement in a new precinct.

Second, the officers allege that they are disadvantaged by their placement in the 70th Precinct. According to plaintiffs, the 70th Precinct is reputed to be a hostile and difficult environment; it is "frowned upon" by other officers, it faces more public and internal affairs scrutiny than other precincts and it has been the subject of many civilian complaints. *See id.* ¶¶ 15, 16. In addition, plaintiffs allege that since the station-house torture of Abner Louima, there appears to be a lack of respect among members of the community for police officers serving that jurisdiction. *See* Deposition of Plaintiff Robin Irvin,

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[15] Seemingly in contrast to this acknowledgment, however, plaintiffs claim that they have received unfair assignments, placements in details and foot posts. See Pls.' 56.1 ¶ 115. Defendants contest this assertion. See Defs.' 56.1 ¶ 5.

December 9, 1998, Ex. T, at 157. This lack of respect leads some plaintiffs to fear for the safety of themselves and their families. For example, one officer who resides on the border of the 70th Precinct fears reprisals from the people he has arrested.

In a somewhat analogous case involving only circumstantial evidence of race-based assignments, a judge found after a bench trial that a police department discriminated on the basis of race in violation of Title VII in its geographical assignment of police officers within the eighteen sectors of the City of Bridgeport. *See Bridgeport Guardians, Inc. v. Delmonte*, 553 F.Supp. 601, 611 (D.Conn. 1983). Statistical evidence of those eighteen sectors demonstrated that black and Hispanic officers were disproportionately assigned to low-income, densely populated, high-crime, high-risk areas of the city where "it goes without saying that [they] experience a heavier workload as well as greater danger and stress than [their white counterparts] assigned to more affluent, lower-crime areas of the city." *Id.* at 610.[16] The officers received the same pay and benefits regardless of their geographic location. Defendants' only explanation for this statistical disparity was "a vague reference" that officers are assigned "according to the relative importance that they may have in different types of neighborhoods." *Id.* at 611. In holding for plaintiffs, the court stated: "Insofar as that reference is an oblique way of explaining that officers are matched by race to the racial composition of a sector, such a rationale is

[16] While the Court never explicitly addressed the element of an adverse employment action, it implicitly found that assigning minority officers to low-income, densely populated, high-crime, high-risk areas of the city, and the resulting increase in workload and stress, amounted to an adverse employment action.

not a valid reason for the disparate pattern of work assignments." *Id.* (citing *Knight v. Nassau County Civil Serv. Comm'n*, 649 F.2d 157, 162 (2d Cir. 1981) (invalidating rationale "based on a racial stereotype that blacks work better with blacks and [] the premise that [an employee's] race [is] directly related to his ability to do the job")).

Although plaintiffs here have not alleged that the geographic area comprising the 70th Precinct has a higher-crime rate,[17] they do believe that this assignment presents greater personal risks. If this fear is merely subjective rather than objective, it cannot alone constitute an adverse employment action. Nevertheless, when combined with the loss of promotion opportunities and "good-will" accrued among supervisors in their former precincts, plaintiffs have made allegations which, if credited by the trier of fact, are sufficient to constitute an adverse employment action.

Thus, although defendants, who bear the burden of showing that there are no genuine issues of material fact, maintain that the officers continue to perform the same jobs, at the same salary, and in a location that is, for the most part, contiguous with their previous work locations, plaintiffs have raised, within the unique circumstances of this case, disputed issues of fact regarding the conditions of their new assignment which precludes summary

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[17] However, former Chief of Patrol Wilbur Chapman testified that the 70th Precinct is a less desirable precinct than others because it is a "high incident" precinct. *See* Deposition of Wilbur Chapman, January 11, 1999 ("Chapman Dep."), Ex. E, 56-57. Because of its "population, because of the quality of life, because of narcotics issues," the 70th Precinct is "busier" than others. "There's a lot of work there." *Id.*

judgment.[18] Whether and to what extent the transfers have harmed plaintiffs is a question for the finder of fact.

3. Defenses Available Under Title VII

a. Bona Fide Occupational Qualification Exception

Plaintiffs move for partial summary judgment on the issue of whether the bona fide occupational qualification ("BFOQ") exception to Title VII provides defendants with an affirmative defense. Under Title VII, several affirmative defenses are available to employers who do not deny a claim of disparate treatment. The primary affirmative defense provided by Title VII in a disparate treatment case is the BFOQ:[19]

> [I]t shall not be an unlawful employment practice for an employer to *hire and employ [an] employee[]* ... on the basis of his *religion, sex, or national origin* in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise....

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[18] The police department has been described as a paramilitary organization. As such, an employee must serve where he or she is assigned. Although an officer may request a transfer to another precinct, there is no guarantee that her request will be granted. Were race not the basis for the assignment, plaintiffs could not challenge a decision to assign them to a more "dangerous" precinct.

[19] Another statutory defense provided by Title VII, that of good faith reliance on a written interpretation and opinion of the EEOC, is not relevant here. *See* 42 U.S.C. § 2000e-12(b).

42 U.S.C. § 2000e-2(e)(1)(emphasis added). The BFOQ exception is quite narrow. It only applies to the "hire and employ" of employees and, most significantly, it does not apply to discrimination based on race or color. *See, e.g., Knight*, 649 F.2d at 157 (involuntary assignment of black personnel specialist to minority recruitment position based on employer's belief that plaintiff would develop "better rapport" than white person with members of minority groups was neither permissible BFOQ nor affirmative action plan). The legislative history of Title VII indicates that this exclusion of race was not an oversight, but an intentional prohibition. *See* 110 Cong. Rec. 2550, 7215-18, 13825 (1964) (both House and Senate rejected proposed amendments to Title VII that would have included race as a permissible occupational qualification).

Despite the statutory bar to a BFOQ defense in race discrimination cases, defendants contend that courts may craft a narrow "judicial BFOQ" for race.[20] Indeed, defendants posit that the Seventh Circuit adopted such an exception in *Wittmer* finding that a preference for a black lieutenant for black prison boot camp inmates did not violate equal protection. In *Wittmer*, however, the Seventh Circuit applied a strict scrutiny test to determine that the hiring of a black lieutenant was narrowly tailored to meet a

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[20] To the extent that defendants couch their defense as a "business necessity" as opposed to a BFOQ, the distinction is irrelevant. *See, e.g., Levin v. Delta Air Lines*, 730 F.2d 994, 997 (5th Cir. 1984); 1 Larson § 11.02[3] at 11-10 to 11-11. An employer may assert a business necessity defense to claims that facially neutral employment practices have a discriminatory impact. *See* 42 U.S.C. § 2000e-2(k) (codifying judicially created exception of *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)). However, this defense is only available where the challenged employment practice is facially neutral.

compelling state interest. The *Wittmer* court did not employ or address whether race could ever be a BFOQ under Title VII. While some courts have suggested in dicta that a racial BFOQ defense may be justified in limited circumstances, *see, e.g., Baker v. City of St. Petersburg*, 400 F.2d 294, 301 n.10 (5th Cir. 1968) (court suggested that special plainclothes assignments of black officers might be justified either to infiltrate a black criminal organization or "during brief periods of unusually high racial tension"), no court has actually approved of a race-based BFOQ. *See, e.g., Ferrill v. Parker Group, Inc.*, 168 F.3d 468 (11th Cir. 1999) (declining to recognize race BFOQ exception and holding affirmative action defense unavailable to telephone marketing company utilizing race-matched calling in get-out-the vote campaign).

Accordingly, plaintiffs' motion to preclude defendants from offering a racial BFOQ defense is granted. Plaintiffs, of course, maintain the burden of proving their Title VII claim.

b. Valid Affirmative Action Plan

Courts have recognized another defense available to employers defending race-based employment actions on the ground that the employer was complying with a valid "affirmative action" plan. *See* 1 *Larson* § 11.04. In considering the validity of an employer's voluntary affirmative action plan, courts look to "whether there is a history of discrimination resulting in a workforce imbalance, whether the plan is temporary in nature, whether it is narrowly tailored to correct the imbalance, and the extent to which it affects the rights of third parties." 1 *Larson* § 11.04 at 11-17. Reliance on an affirmative action plan is not technically an affirmative defense, and the

burden of proof rests with the plaintiffs to show the invalidity of the plan. *See Johnson v. Transport. Agency*, 480 U.S. 616, 627, 107 S.Ct. 1442, 94 L.Ed. 2d 615 (1987).

Plaintiffs argue that the transfers were not based on an "affirmative action plan". However, defendants argue that "under the aegis of 'affirmative action,' employers may engage in disparate treatment in favor of a protected class for the purpose of remedying past discrimination." *See* Defs.' Reply Mem. at 6 n.7. According to Commissioner Safir, the NYPD "makes its best efforts to reflect the diversity of the communities it serves." Safir Dep. at 28. This policy stems from a "management judgment based on the fact that communities very often request and find it easier to communicate with individuals who look like them." *Id.* at 29; Defs.' 56.1 ¶ 10. Defendants testified that in keeping with long-time recommendations regarding police management, it was their usual practice to place minorities in particular precincts because of their race and language skills. *See* Markman Dep. at 57-58, 61; Safir Dep. at 28-29. For example, the NYPD attempts to assign Chinese-speaking officers to Chinatown, Russian-speaking officers to Brighton Beach and Spanish-speaking officers to Washington Heights. *See* Markman Dep. at 79-80, 83. Nevertheless, Safir acknowledges that not all black police officers are alike: not all black police officers are necessarily sensitive to the needs of the black community; and some white officers might be sensitive to the black community. *See* Safir Dep. at 33, 38.

Plaintiffs are not challenging defendants' policy of achieving a racial and ethnic composition of the police force reflecting that of the community. Rather, the issue is whether the involuntary transfer of a group of officers

because of their race and not their language skills, constitutes a "valid affirmative action program", or whether it constitutes an adverse employment action with respect to plaintiffs who may remain permanently disadvantaged by that action.

The valid affirmative action plan exception to Title VII is available to remedy "a history of discrimination resulting in a workforce imbalance." 1 *Larson* § 11.04 at 11-17. Unlike typical cases involving affirmative action plans, there is no suggestion that City or police officials are seeking to remedy past discrimination resulting in a workforce imbalance. Indeed, defendants do not concede that they ever discriminated and are not seeking to remedy past discrimination. Rather, defendants appear to be remedying past discrimination by the police *against the community*. This is not an appropriate basis for an affirmative action plan as aptly stated in *Knight*. Similar to the transfer decision in *Knight*, the transfer decision here appears to be

> based on a racial stereotype that blacks work better with blacks and on the premise that [the officers'] race was directly related to [their] ability to do the job. No matter how laudable [defendants'] intention might be ... the fact remains that [the officers] were assigned a particular job (against [their] wishes) because [their] race was believed to specially qualify [them] for the work. This is a violation of Title VII.

Knight, 649 F.2d at 162. In short, an affirmative action exception to plaintiffs' Title VII claim is inappropriate and defendants are precluded from raising such a defense.

V. Conclusion

For the foregoing reasons, defendants' motion for partial summary judgment on the equal protection claim as to whether law enforcement's "operational needs" may constitute a compelling state interest is granted. However, defendants bear the burden of proving at trial that such an "operational needs" defense fits the circumstances of this case. Defendants' motion for summary judgment on the Title VII claim based on plaintiffs' failure to offer proof of an adverse employment action is denied. Plaintiffs' motion for summary judgment on their equal protection claim on the ground that the decision to transfer them was not narrowly tailored to meet a compelling state interest is denied. Plaintiffs' motion for partial summary judgment on their Title VII claim to preclude defendants from raising a BFOQ or affirmative action defense to their Title VII claim is granted. A conference is scheduled for October 1, 1999 at 4:30 p.m.

97 Civ. 7895 (SAS), 98 Civ. 8202 (SAS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INCORPORATED, for itself and on behalf of its members, Police Officers GARY JOHNSON, MISSIE LEWIS-MANNING, ROBERT DRAYTON, MARVA GARDNER, DEMETRIA SINGLETON, MARGO MCKENZIE, ROBERT WINSLOW, KENNETH ZEPHERIN, OSCAR ESPINAL, DAVE GUEVERA, PEGGY ALVES, ROBIN IRVIN, SILAS PLUNKETT, RONNY FORBES, ALTON WALKER, BARRY HINDS, TSELANEE KITCHING, LAVERNE STUGER, MICHAEL BUTLER, CAROLE P. SIEVWRIGHT, INGER BARRON AND RONALD S. ARCHER,

Plaintiffs,

-against-

THE CITY OF NEW YORK, RUDOLPH GIULIANI, as Mayor of the City of New York and individually, HOWARD SAFIR as Police Commissioner of the City of New York and individually, New York City Deputy Police Chief PATRICK BRENNAN, officially and individually, Deputy Police Chief CORNELIUS J. DEVER, officially and individually, Chief MICHAEL A. MARKMAN, officially and Individually, PATRICK J. KELLEHER, First Deputy Commissioner, officially and individually, SGT. DEBORAH PETERS, of the Patrol Borough Chief's Office, individually and in her official capacity, Patrol Chief WILBUR CHAPMAN, individually and in his official capacity,

Defendants.

MEMORANDUM
OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

Following a jury trial in which plaintiffs prevailed, the parties have brought several post-trial motions.[1] Specifically, defendants have moved for judgment as a matter of law and for a new trial while plaintiffs have moved for certain equitable relief. For the reasons that follow, all of these motions are denied.

A. JUDGMENT AS A MATTER OF LAW/NEW TRIAL

Defendants have renewed their motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure ("Rules"), and also moved for a new trial under Rules 59 and 60. Defendants raise two issues in their Rule 50(b) motion. First, at the close of plaintiffs' case, defendants moved for judgment as a matter of law under Rule 50(a) on all of plaintiffs' Title VII and state and local discrimination claims on the ground that plaintiffs failed to establish any adverse employment action. Second, defendants also moved for a directed verdict on their claims under 42 U.S.C. §§ 1981 and 1983 on the grounds that no reasonable juror could find that: (1) there was not a crisis which justified transferring minority Police Officers into the 70th Precinct, because of their race, pursuant to the operational needs of the New York City Police Department; and (2) the transfers in issue were not narrowly tailored to satisfy this compelling state interest.

[1] The law and facts surrounding the instant litigation are set forth in *Patrolmen's Benevolent Ass'n of the City of New York v. City of New York*, 74 F.Supp.2d 321 (S.D.N.Y. 1999) ("Opinion"), familiarity with which is assumed for purposes of these motions.

Rule 50 permits a court to enter judgment against a party where "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue..." Fed. R. Civ. P. 50(a). In making this determination, a court "must give deference to all credibility determinations and reasonable inferences of the jury, and may not weigh the credibility of witnesses or otherwise consider the weight of the evidence." *Caruolo v. John* Crane, *Inc.*, 99 Civ. 7501, 2000 WL 1233181, at *3 (2d Cir. Aug. 31, 2000) (internal quotation marks and citation omitted). Thus, judgment as a matter of law should be granted only if: "(1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair mined [persons] could not arrive at a verdict against [it]." *Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F.3d 276, 289 (2d Cir. 1998) (citations omitted) (alterations in original).

The first prong of defendants' Rule 50(b) motion is limited to the jury's verdict as to Oscar Espinal, the only plaintiff to obtain a favorable verdict under Title VII because the jury found he suffered an adverse employment action. As the jury found no adverse employment action as to the remaining twenty-three plaintiffs, defendants cannot move to overturn a favorable verdict. *See Giant Eagle, Inc. v. Federal Ins.* Co., 884 F. Supp. 979 (W.D. Pa. 1995) (under Rule 50, a court may "enter judgment as a matter of law *against* a party that receives a favorable jury verdict if there is insufficient evidence for a reasonable jury to find for that party) (emphasis added).

When ruling on defendants' Rule 50(a) motion, I found that several factors surrounding the transfers could lead a reasonable jury to find that plaintiffs suffered an adverse employment action. Such actions might include: decreased opportunities for promotion; increased probability of receiving civilian complaints; loss of special assignments and of seniority within a special bureau or

division; and the hostile work environment in the 70th Precinct. *See* Trial Transcript ("Tr.") at 2292-2299. The issue was then submitted to the jury which found that only one of the twenty-four plaintiffs, Oscar Espinal, had established an adverse employment action.[2] I now conclude, for the same reasons listed above, that there was a legally sufficient evidentiary basis for the jury's finding.[3] Accordingly, defendants' renewed motion under Rule 50(b) with regard to plaintiffs' discrimination claims is denied.

Defendants' renewed motion with respect to the §§ 1981 and 1983 claims is denied for similar reasons. Because defendants conceded that the transfers were based solely on race, the only issue decided by the jury was whether defendants had sustained their burden of proving that the transfers were permitted due to exigent circumstances. *See* Opinion, 74 F.Supp.2d at 330 & n.10. The jury heard conflicting evidence as to whether the so-called "Louima incident" was a crisis which justified race-based transfers. The jury apparently credited the testimony presented by the plaintiffs when it found that there were no exigent circumstances justifying the transfers and that such transfers were not narrowly tailored to respond to such circumstances. Because this Court cannot make credibility determinations or weigh the evidence on a Rule 50 motion, and because there was adequate evidence in the record to support the verdict, it would be inappropriate to usurp the

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[2] With regard to the adverse employment action suffered by Oscar Espinal, he testified that he lost his position as a domestic violence officer, which he held at the 68th Precinct, upon being transferred to the 70th Precinct and that he was unable to secure that position at his new precinct. *See* Tr. at 1366, 1372. Oscar Espinal also testified that there was no communication among officers at the 70th Precinct, that morale was very, very low, *see* Tr. at 1373, and that the public would often make fun of him while he was on patrol. *See* Tr. at 1374.

[3] This conclusion is, of course, limited to the jury's verdict as to Oscar Espinal. I reach no such conclusion as to the remaining twenty-three plaintiffs.

jury's finding with regard to liability. *See Caruolo*, 2000 WL 1233181, at *3. Therefore, defendants' renewed motion on plaintiffs' §§ 1981 and 1983 claims is also denied.

Defendants also moved for a new trial, pursuant to Rules 59 and 60, on the following grounds:[2] (1) the verdict was inconsistent, punitive, and constituted a compromise verdict; (2) the charge regarding causation was erroneous; (3) the charge regarding corroboration of claims of emotional distress was erroneous; and (4) it was error to marshal the evidence in the jury instructions. "As a general matter, '[a] motion for a new trial should be granted when, in the opinion of the district court, the jury has reached a seriously erroneous result ... or the verdict is a miscarriage of justice.'" *DLC Management Corp. v. Town of Hyde Park*, 163 F.3d 124, 133 (2d Cir. 1998) (quoting *Song v. Ives Labs., Inc.*, 957 F.2d 1041, 1047 (2d Cir. 1992) (internal quotation marks and citations omitted)). While the first and third grounds raise serious issues that present difficult legal questions, I do not find that they meet the standard for a new trial on either liability or damages. Accordingly, defendants' motion for a new trial is denied. *See DLC Management*, 163 F.3d at 134 (court should only grant a motion for a new trial where the jury's verdict is "egregious"). Defendants must now pursue their claims in the Court of Appeals.[3]

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[2] Rule 60 is clearly inapplicable as that Rule provides for relief from judgment for such things as clerical mistakes, inadvertence, excusable neglect, newly discovered evidence and fraud. Fed. R. Civ. P. 60 (a) & (b). None of these categories apply here. Rule 59, on the other hand, provides for a new trial for "any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a).

[3] Once judgment is entered this case will be immediately appealable despite the fact that the amount of attorneys' fees has not yet been determined. In *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 452 n.14 (1982), the Supreme Court held that Rule 59(e) was

II. Equitable Relief

Plaintiffs have requested the following equitable relief:

> (1) That the Defendants be enjoined from making race based transfers absent exigent circumstances or, in the

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inapplicable to fee requests under 42 U.S.C. § 1988. In dictum, the Supreme Court stated:

> If a merits judgment is final and appealable prior to the entry of a fee award, then the remaining issue must be "collateral" to the decision on the merits. Conversely, the collateral character of the fee issue establishes that an outstanding fee question does not bar recognition of a merits judgement as "final" and "appealable."

The Second Circuit has held that "a judgment on the merits in favor of a plaintiff is a final judgment under 28 U.S.C. § 1291 even though statutory attorneys' fees remain undetermined." *Abrams* v. *Interco Inc.*, 719 F.2d 23, 27 (2d Cir. 1983*). See also Baden v. Koch*, 79 Civ. 4296, 1984 WL 859, at *1 (S.D.N.Y. Sept. 13, 1984) (there is no question about the appealability of a judgment where "an outstanding fees issue remains to be determined or the merits judgment finds entitlement to fees but leaves that amount undetermined").

Although the Second Circuit has held that "[w]here attorney's fees and costs have been awarded, but not determined, the order is not final," *Krumme* v. *Westpoint Stevens Inc.*, 143 F.3d 71, 86 (2d Cir.) (citations omitted), *cert. denied*, 525 U.S. 1041 (1998), that was done in the case of contractually stipulated attorneys' fees. In so doing, the Circuit relied on *Discon, Inc. v. NYNEX Corp.*, 4 F.3d 130, 133 (2d Cir. 1993) ("[A] sanction order that leaves the amount of the sanction for later determination is not final and, therefore, not appealable under § 1291."); and *F.H. Krear & Co. v. Nineteen Named Trustees*, 776 F.2d 1563, 1564 (2d Cir. 1985) (per curiam) ("We have held that where attorneys' fees are a contractually stipulated element of damages, a judgment is not final until the fees have been determined."). Neither *White* nor *Abrams* are cited in *Krumme.* Accordingly, *Krumme's* holding is limited to those situations where attorneys' fees are a contractual element of damages. Here, the statutory attorneys' fees are collateral to the judgment on the merits.

alternative, that the Defendants be enjoined from making race based transfers of the individual Plaintiffs absent exigent circumstances;

(2) That the individual Plaintiffs be afforded the opportunity to transfer from the 70th Precinct within 60 days of the entry of judgment giving the Police Department a "wish-list" of three (3) precincts, one of which being the precinct from which the individual Plaintiff was originally transferred to the 70th Precinct.

Letter from Marshall D. Trager, Esq. dated July 10, 2000, at 1.

In determining whether to grant this requested relief, it is noteworthy that defendants deny ever making or intending to make race-based transfers absent exigent circumstances. *See* Letter from Donald C. Sullivan, Esq. dated September 11, 2000, at 1. Given defendants' voluntary commitment to abstain form race-based transfers absent exigent circumstances, plaintiffs are seeking, in effect, an injunction limiting the City's ability to make race-based transfers until a court has found the particular circumstances to be exigent.

There are a number of difficulties inherent in enforcing such an injunction. First and foremost is the fact that such an injunction represents an undue intrusion into a matter of state sovereignty, namely, the internal operation of the New York Police Department ("NYPD"). As the Supreme Court has counseled, "appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." *Rizzo v. Goode*, 423 U.S. 362, 379 (1976) -(citation omitted). Accordingly,

> [w]hen a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs.

Id. at 378-79 (internal quotation marks and citations omitted). *See also Portland Police Assoc. v. City of Portland*, 658 F.2d 1272, 1274 n.3 (9th Cir. 1981) (equitable relief not available where it would require "federal courts to disturb the inner workings and structure of a local police department").

Here, plaintiffs would require a court to define "exigent circumstances" and determine when and if particular circumstances fell within that definition before the Police Department could make race-based transfers. Not only is a court ill-equipped to make such decisions but the delay occasioned by such judicial interference could diminish or negate the efficacy of the NYPD's response. This Court declines to "inject[] itself by injunctive decree" into the internal operations of the NYPD. *See Rizzo*, 423 U.S. at 380. *See also Miller v. Silberman*, 951 F.Supp. 485, 492 (S.D.N.Y. 1997) ("where the equitable relief sought would inappropriately require the federal court to supervise institutions central to the state's sovereignty, it should not be entertained") (citations omitted).

Other considerations also weigh against granting this equitable relief. In order to obtain the requested relief, plaintiffs "must not only succeed on the merits, [they] must also demonstrate that there is no available remedy at law and that the balance of equities favors granting the requested relief." *Nieves v. Coggeshall*, 96 Civ. 1799, 2000 WL 340749, at *3 (D. Ct. Jan. 31, 2000) (citation omitted). In evaluating the equitable factors, a court must consider "whether there is a reasonable likelihood that the wrong will be repeated." *Chris-Craft Indus., Inc.* v. *Piper Aircraft*

Corp., 480 F.2d 341, 385 (2d Cir. 1973) (citation omitted). Here, plaintiffs concede that situations that would justify race-based transfers are of a "rare and unlikely character." Letter from Linda M. Cronin, Esq. dated September 25, 2000, at 2. The NYPD asserts that in its entire history, this is the only incidence of race-based transfers. *See* Sullivan Letter, at 1. Thus, there is little reason to believe that another such incident will occur. *See United* States v. *Concentrated Phosphate Export Assoc.*, 393 U.S. 199, 203 (1968) (injunctive relief may be unnecessary where likelihood of further violations is remote) (citing *United Stares v. W. T. Grant Co.*, 345 U.S. 629, 633-36 (1953)). For all of these reasons, plaintiffs' first request for injunctive relief is denied.

Plaintiffs' second request for injunctive relief is denied because it is unnecessary. The transfer options requested by plaintiffs are already provided by the NYPD. *See* Sullivan Letter, at 2. Of the twenty-four plaintiffs, eight are no longer working at the 70th Precinct. *See id.* Moreover, two officers who were transferred from the 70th Precinct subsequently requested that they be permitted to return. See *id.* Several of the remaining officers testified that they were not interested in seeking a transfer at this point in their careers. *See id.* Those officers who are still interested in transferring out of the 70th Precinct can do so under the currently available transfer options. Accordingly, plaintiffs' second request for injunctive relief is denied.

Conclusion

Because all pending motions other than that for attorneys' fees are now decided, plaintiffs are directed to submit a Proposed Judgment in accordance with the jury's verdict forthwith.

Dated: New York, New York
October 13, 2000

SO ORDERED

S/
Shira A. Scheindlin
U.S.D.J.

Appearances

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INCORPORATED, FOR ITSELF AND ON BEHALF OF ITS MEMBERS, SERGEANTS' BENEVOLENT ASSOCIATION, INCORPORATED, FOR ITSELF AND ON BEHALF OF ITS MEMBERS POLICE OFFICER GARY JOHNSON, POLICE OFFICER MISSIE LEWIS-MANNING, POLICE OFFICER ROBERT DRAYTON, POLICE OFFICER MARVA GARDNER, POLICE OFFICER DEMETRIA SINGLETON, POLICE OFFICER MARGO MCKENZIE, POLICE OFFICER ROBERT WINSLOW, POLICE OFFICER KENNETH ZEPHERIN, AND POLICE OFFICER OSCAR ESPINAL, POLICE OFFICER DAVE GUEVERA, POLICE OFFICER PEGGY ALVES, POLICE OFFICER ROBIN IRVIN, POLICE OFFICER SILAS PLUNKETT, POLICE OFFICER RONNY FORBES, POLICE OFFICER ALTON WALKER, POLICE OFFICER BARRY HINDS, POLICE OFFICER TSELANEE KITCHING, POLICE OFFICER LAVERNE STUGER, POLICE OFFICER MICHAEL BUTLER, POLICE OFFICER CAROLE P. SIEVWRIGHT, POLICE OFFICER INGER BARRON AND POLICE OFFICER RONALD S. ARCHER, SERGEANT PHILIP S. TAI, AND SERGEANT JOHN W. ROBERTSON,

Plaintiffs,

-against-

THE CITY OF NEW YORK, HOWARD SAFIR, as Police Commissioner of the Police Department of the City of New York, and individually, DEPUTY POLICE CHIEF CORNELIUS J. DEVER, officially and individually, CHIEF MICHAEL A. MARKMAN, officially and individually, CHIEF PATRICK J. KELLEHER, First Deputy Commissioner, officially and individually, PATROL CHIEF WILBUR CHAPMAN, individually and in his official capacity,

Defendants.

JUDGMENT

A Jury Trial before the Honorable Shira A. Scheindlin, United States District Judge, having begun on May 24, 2000; the causes of action plead by plaintiffs Patrolmen's Benevolent Association and Sergeants' Benevolent Association having been dismissed by the Court due to lack of standing, the Court having denied plaintiffs' request for injunctive relief, and at the conclusion of the trial, the jury having rendered a verdict in favor of each of the twenty-four individual plaintiffs in the amount of $50,000.00, it is,

ORDERED, ADJUDGED AND DECREED: That judgment is entered in favor of the defendants and against the plaintiffs dismissing the claims of the Patrolmen's Benevolent Association and Sergeants' Benevolent Association, plaintiffs' request for injunctive relief is denied, and judgment is entered in favor of the twenty-four individual plaintiffs and against the defendants in the amount of $50,000.00 for each plaintiff.

Dated: New York, New York
November 17, 2000

JAMES M. PARKISON

Clerk of Court

So Ordered:

S/ _____ BY: S/ _____

U.S.D.J. Deputy Clerk

Docket No. 00-9538

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INCORPORATED, et al.,

Plaintiffs-Appellees,

v.

SERGEANT'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC. et al.,

Consolidated-Plaintiffs-Appellees,

CITY OF NEW YORK, et al.,

Defendants-Appellants.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by appellants, THE CITY OF NEW YORK, RUDOLPH GUILIANI, as Mayor of the City of New York and individually, HOWARD SAFIR, as Police Commissioner of the Police Department of the City of New York and individually, PATRICK BRENNAN, New York City Deputy Police Chief Officially and Individually, CORNELIUS J. DEVER, Deputy Police Chief, Officially and Individually and MICHAEL A. MARKMAN, Chief, Officially and Individually.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is **DENIED**.

It is further noted that the petitions for rehearing en banc have been transmitted to the judges for the Court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE

By: S/
Arthur Heller,
Administrative Attorney

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Filed
Dec. 13, 2002
Roseann B. MacKechnie, CLERK

UNITED STATES CONSTITUTION

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

United States Code

Title 42 The Public Health and Welfare

Section 1981 Equal rights under the law

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens , and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other .

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against

impairment by nongovernmental discrimination and impairment under color of the State law.

Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subject, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. for the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 1985. conspiracy to interfere with civil rights.

(1) Preventing officer from performing duties. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of

his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder him or impede him in the discharge of his official duties.

No. 02-1321

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE CITY OF NEW YORK, *et al.*,

Petitioners,

v.

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS WHO HOLD THE RANK OF POLICE OFFICER

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COUNTER STATEMENT OF THE CASE[1]

On August 9, 1997, Abner Louima, a black man of Haitian national origin, was arrested by officers of the New York City Police Department (hereinafter referred to as the "NYPD"). Shortly thereafter he was sexually assaulted by Police Officers in the 70th Precinct station house bathroom in Brooklyn, New York (hereinafter referred to as the "Louima incident"). Several weeks later, the record shows that Howard Safir, the Commissioner of the NYPD (hereinafter referred to as the "Commissioner") unilaterally transferred twenty-four (24) black police officers into the 70th Precinct. These transfers were based upon his belief that people respond best to people who look like them and upon his unsupported and unfounded fear of the potential for violent civil unrest (A471)[2]. Only after the lawsuit was filed did the Commissioner maintain that the illegal race based transfers were based upon an operational necessity. The Commissioner testified that a demand for these transfers was made at a meeting convened with him, the Mayor Rudolph Guiliani and the community leaders, two days after the Louima incident (A458). Specifically he testified that Councilwoman Una Clarke[3] (among others) told him that

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1. This brief is submitted on behalf of all the named plaintiffs-respondents who hold the rank of police officer and are hereinafter collectively referred to as "respondents".

2. Numbers in parentheses preceded by the letter "A" refer to the page numbers of the Joint Appendix filed in the Second Circuit. Numbers preceded by the letter "B" refer to the page numbers of the Appendix of the Petition for Writ of Certiorari.

3. Una Clarke, a New York City Councilwoman whose district includes the 70th Precinct.

the community demanded the transfer of black police officers into the 70th Precinct. However, in complete contradiction, Una Clarke testified that she never asked for, nor did she hear anyone else ask for the transfer of black police officers into the 70th Precinct (A820, A821, A825). Throughout the following weeks, even though there were uniformly peaceful protests, the Commissioner testified that he believed there was "a great potential for violence" (A459). Under the guise of operational necessity, these race based transfers occurred more than two weeks after the Louima incident, with the last transfer completed more than four weeks later.

All twenty-two police officers and two sergeants who were transferred, based solely on their race, brought suit against the Petitioners herein alleging violations of 42 U.S.C. § 1981; 42 U.S.C. § 1983; 42 U.S.C. § 1985; Title VII of the Civil Rights Act of 1964; the United States Constitution including the Equal Protection, Due Process, and Privileges and Immunities provisions of the Constitution and Amendments; Article I and II of the New York State Constitution; and § 296 of the New York State Executive Law.

The City of New York (hereinafter referred to as the "City"[4]) has conceded, as noted by the Second Circuit in its opinion, that the transfers of the minority officers were based solely on race (B7). Since race based transfers are inherently impermissible, the City argued the pretext of "operational needs".

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4. Unless otherwise noted,"City" refers to the petitioners in this lawsuit collectively.

In the district court, both the City and the plaintiffs moved, at pretrial, for summary judgment on various grounds. In the decision of *Patrolmen's Benevolent Association v. City of New York*, 74 F. Supp. 2d 321 (S.D.N.Y. 1999), the trial court found that the City's "operational needs" could constitute a compelling state interest to justify the illegal race based transfers, **but the jury would need to make a factual determination at trial that an "operational need" existed** (emphasis added). It was the City's burden to prove such a need at trial. The jury's unanimous verdict was that the City failed to meet this burden.

Over forty witnesses all uniformly testified at trial that prior to the illegal race based transfers, the neighborhood remained peaceful without riots or property destruction or arrests for violence or any other evidence of a "potentially violent" situation. Furthermore, officers specifically assigned to observe and report on the post Louima environment in the 70th Precinct found no civil unrest. Detective Yvan Pierrelouis, Caribbean Liaison for the NYPD, testified as to the general tenor of the protests. He testified to canvassing and surveying the temperament of the community and found no rioting, looting, property damages, or injuries in the aftermath of the Louima incident (A276). He specifically testified, on August 16, 1997, that he monitored a march and rally, which terminated in front of the 70th Precinct station house, and found the march to be "peaceful" (A278). Likewise, Police Officer Corlis Smith, Community Liaison for Brooklyn South and Staten Island, testified that there was "no civil unrest" (A257). The City showed the jury a videotape recording of the aforesaid march and rally, which clearly depicted the orderly and peaceful nature of the demonstration in the community.

A. Events Immediately Following the Louima Incident

As noted above, once the details of the Louima incident were made public, the intervening days were marked by a small number of peaceful demonstrations. On August 13, 1997, four days after the Louima incident, an orderly demonstration of "approximately 20 people" took place in front of the 70th Precinct (A206). It lasted one-half hour and its participants were vocal, yet peaceful, as testified to by Captain William Walsh, Commanding Officer of the 70th Precinct at the time (A206). Of critical importance is the fact that even Patrick Kelleher, First Deputy Commissioner of the NYPD, testified at trial that there was no violence (A492). James Hall, Executive Officer of the 70th Precinct, also testified that the protests were peaceful (A938).

As previously stated, the City's "operational needs" defense was allegedly based on community demand. The Commissioner testified that in two separate conversations with Councilwoman Clarke she stated, in no uncertain terms, that the NYPD "needed to do something very quickly and that if we didn't do something very quickly, there was going to be trouble." (A475). However, Ms. Clarke's statement was taken out of context as it referred specifically to removing all personnel from the station house *who were on duty* the night of the Louima incident (A820). There is no dispute that the white officers on duty that evening were immediately transferred out of the precinct in response to the community demand. The record is devoid of any request for the immediate transfer of black officers into the precinct.

On August 11, 1997, two days after the Louima incident, the Commissioner and Mayor met with leaders of the community in the 70th Precinct. Although the Commissioner testified at trial that various community leaders demanded the transfer of black officers, the City failed to offer the testimony of a single community leader to support the Commissioner's recollection of this "overwhelming theme". Indeed the only individual whose name the Commissioner recalled who attended the meeting was Councilwoman Una Clarke, who acted as a liaison between the community and the NYPD. However, she testified that she *never* requested that black police officers be transferred into the 70th Precinct. She testified clearly and unequivocally that "I did not ask for black police officers." (A820-A821). Further, Councilwoman Clarke testified that no community leader specifically asked for or demanded the transfer of black or Haitian police officers into the 70th Precinct. "No community leader told me that they wanted black officers." (A825).[5]

Contrary to Petitioners misstatement in their **QUESTIONS PRESENTED** that the 70th Precinct was "80% minority population", the City's statistical evidence presented at trial, established that the 70th Precinct was in fact a community comprised of 40.5% Blacks, and 21.3% of other minorities (A1300).[6] Incredulously, blacks and/or Haitians did not comprise a majority of the population within the

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5. In pretrial discovery the city had named approximately six such leaders on their witness list but failed to produce any at trial.

6. The misstatement used by Petitioners in their **QUESTIONS PRESENTED** is found in the testimony of the Commissioner who stated, in response to the inquiry concerning the racial make-up in the 70th Precinct, that he "believed" it to be 80%. (A912).

70th Precinct (NYPD Ethnographic Chart for Patrol Borough Brooklyn South, A1300). Captain Walsh testified that the Haitian community within the 70th Precinct was "relatively small" (A204). In addition, Councilwoman Clarke testified that the Haitian community did not comprise a majority of the 70th Precinct or even of the Carribean community within the 70th Precinct (A821).

Ironically and consistent with Una Clarke's testimony, the only documented demand made by the community was the request to return one of the white officers who had been transferred out. Raymond Diaz, Commanding Officer of the 70th Precinct at the time of the transfers, testified that he could not get approval to bring back the white female transferee despite community demand (A903).

The Commissioner testified at trial that there was what he believed to be a "great potential for violence" and that the NYPD "needed to act quickly and as quickly as possible to put people in the community who would have a stake in the community" (A468). Despite the Petitioners apparent belief that the situation in the 70th Precinct was volatile and exigent, the Commissioner did not utilize more immediate and less restrictive measures (A461). It is undisputed by the Commissioner's own testimony that this alleged emergency response took weeks to complete (A461).

In order to address what he believed to be an emergent situation, the Commissioner did not choose to "press a button" and effect immediate transfers within minutes, as he testified he was empowered to do (A461). Rather, the Commissioner directed his subordinates to utilize a lengthy bureaucratic time consuming personnel selection process

with the only selection requirement that the officer be black.[7] The process took weeks to complete even though the NYPD's Chief of the Personnel Bureau testified that "the most likely chance that you will have a demonstration is in close proximity to when the incident occurred" (A1091). Petitioners made no efforts to immediately address the alleged "operational needs" despite the fact that personnel changes could have been ordered within minutes by the Commissioner (A461). After a four week trial with over 40 witnesses and a videotape of an orderly demonstration, the jury found the "operational needs" defense was not supported by the weight of the evidence. The Respondents' own testimony and videotape belied the "operational needs" defense.

Moreover, despite the unprecedented situation in the community, the police officers transferred into the 70th Precinct were not specifically trained for the assignment and did not receive "any special or specific instructions" about their duties and the problems they might face (A538).

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7. Virtually all of the commanding officers that were directed to transfer officers to the 70th Precinct testified consistently that the only requirement that they were given was that the officers must be black (A317). This is confirmed by the testimony of Paul Schmucker, a Deputy Inspector and the Commanding Officer of the 69th Precinct at the time of the race based transfers. He testified as to the qualifications the NYPD required of the transferees; stating specifically, that black police officers were required without regard to time of service, civilian complaints, or disciplinary records (A318). Donald O'Donnell, the Commanding Officer of the 66th Precinct at the time of the race based transfers, was given specific instructions as to the selection. When asked "other than the fact that the officers were to be African-American or black, what other instructions were you given by the borough, if any," O'Donnell responded that he received "*no other instructions*." (A596).

In fact, Deputy Inspector O'Donnell, who was responsible for transferring eight of the Respondents, testified that his least experienced black police officers were transferred into the 70th Precinct (A596).

It is undisputed that there were less restrictive measures the City could have used to effectuate their perceived operational necessity other than the race based transfers. Specifically, as testified to by Respondents' expert Dr. Stephen Leinin, the department could have requested volunteers, and if no volunteers came forward, the Police Department could have tacked on any number of incentives for those who were willing to go into the 70th Precinct (A847). Further, they could have reached out for those Haitian-American officers that were working elsewhere in the city and they, perhaps, could have even offered them an incentive. In fact, Inspector Diaz testified that two police officers, one of which was Caribbean and another who was of Haitian descent, volunteered to be transferred into the 70th Precinct, but neither of their requests were honored (A906).

Finally, they could have hand-picked a variety of different officers from different racial and ethnic groups and made sure that the officers that they did hand-pick were trained in police/community relations (A847). The testimony presented, established the fact that there was a pattern and practice of race based transfers and reassignments. First Deputy Commissioner Kelleher initially stated at trial that race is a consideration when officers are initially assigned out of the police academy (A482, A491).

The jury having heard the aforesaid testimony by both Kelleher and Leinin, could reasonably conclude that

Petitioners proffered defense of an "operational need" for these race based transfers was wholly unsupported by the evidence.

B. Damages Suffered By Black Transferees

All witnesses both for Petitioners and Respondents testified that the 70th Precinct was a stressful, demoralizing, and humiliating place to work in the aftermath of the Louima incident. All of the command staff testified that morale was at an all time low (A237). All Respondents herein have testified that they felt betrayed by the NYPD for treating them differently solely because of the color of their skin. The Respondents' position was summed up by Officer Gary Johnson who testified:

> I felt *betrayed* because I was transferred because of my race and that, in fact, placed me at high risk. When I took this job, I took this job with everyone else in the police department for shared risk, that we should all take. By sending me solely because I'm black, placing me at a higher risk than anyone else and all my other colleagues (A245).

Further, Officer Marva Gardner testified that:

> I was totally upset because all these years, when I got hired to do this job, my race didn't factor into it. The only thing that factored into it was that my performance, the type of job that I was doing. It didn't matter that I was black or I wasn't black. And now, here it is ten years later and you're telling me that I can only preform my job in a black community, I can't do the job anywhere

> else? In my opinion, that's what they were saying to me, that I was only effective working with my own people and not anyone else (A303).

The testimony revealed that black police officers were subjected to greater prejudice because of their race. The treatment the transferred police officers received from the community as a whole and the perception of the black police officers by members of the community was worse than the treatment received by their white counterparts. Officer Robert Drayton testified that "they call you Uncle Tom. They will give you the finger. They just have no respect for you; you know; throw things out the window at you." (A325). Officer Dave Guevera, testified that when he was stationed outside the 70th Precinct, he had to endure insults from the community. "They called me names, such as 'Uncle Tom,' 'sell out.' They cursed at me. They put their fingers up at me. (A338). Furthermore, Officer Robert Winslow testified that "they would say things like 'You're going to shove that stick up my ass also' or 'plunger posse,' or they would refer to me as like a 'house nigger,' 'Uncle Tom.'" (A538). Only a few of the epithets directed at black police officers are excerpted above. All the Respondents were subject to derogatory remarks concerning their involvement in the Louima incident. In fact, Respondent Robin Irvin, testified that being black made the situation all the more difficult (A384).

The low morale caused by the race based transfers in the 70th Precinct was in stark contrast with the atmosphere of comradery at the precincts from which the Respondents were transferred. As all parties testified, "[t]he morale, it was very low. Very poor morale. No one knew who anyone was." (A237). Exemplifying this low morale, was the testimony of Officer Michael Butler to the effect that when roll call began

at the 70th Precinct, "you see white officers on the left-handed side and black officers and minorities on the right-side on roll call" (A939).

The Respondents' home and private lives were also impacted by the transfers. Officer Kenneth Zepherin testified that he had to drop his college classes after he was transferred (A349). Officer David Guevera testified that he had problems with his girlfriend and his family as a result of the stress of being transferred (A346).

The significant stress which the Respondents suffered as a result of being singled out, based on their race, caused stress to their families and disruption in their home lives. Officer Robert Winslow felt "horrible inside." (A539). Officer Plunkett Silas testified that he felt "humiliated" and "ashamed" so much so that he "didn't want to go to work." (A394). As a result, he suffered from headaches and had to see a headache specialist (A395). Demetria Singleton testified that when she found out about the race based transfers she felt "angry" and "disgusted." (A560). In addition, her transfer was a hardship because she had an autistic son who "cannot accept change" (A562) and she also experienced increased difficulty obtaining child care because her commute was more than doubled (A559). She called Employee Relations and told the Sergeant "the situation with [her] two children that are labeled as disabled, autistic, and told him my situation as a single mother. You know, I was working in the 62. I had school close by. I had everything already situated." (A560). As a result of the increased stress on her, Ms. Singleton also had to seek counseling from her pastor (A564).

Adding to the transferees' emotional stress was the fact that, unlike any other NYPD officers, their requests to transfer

were summarily denied. Lou Matarazzo, the then President of the New York City Patrolmen's Benevolent Association (Police Union), testified that he contacted the NYPD regarding the transfers and stated that the NYPD's response "was rather simple: no one was transferred back and they were going to stay there." (A313). The evidence substantiates Matarazzo's testimony that the NYPD maintained that position. The police officers who would not accept their assignment to the 70th Precinct and filed a request for transfer, did so, only to have their requests deleted from the system. (A334, A339).

In summary, as the trial court stated, "in order to prevail on this defense, defendants must demonstrate, at trial, that [1] community hostility towards the NYPD followed the Louima incident [2] such hostility compromised the goal of effective law enforcement and that [3] race-based transfers would restore that goal." *Patrolmen's Benevolent Association v. City of New York*, 74 F. Supp. 2d at 329-330. The jury unanimously rejected the defense and refused to find justification for the race based transfers. The fact that there was no evidence of hostility or civil unrest, as the Petitioners conceded at trial, gave the jury a basis to find that the goal of effective law enforcement was never compromised. Therefore, Petitioners' never established an "operational need" to justify or legalize the race based transfers.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT PRESENT A CONFLICT.

The decision of the Second Circuit clearly follows the standards set by this Court. In *Wygant v. Jackson Bd. of Educ.*[8], 476 US 267 (1986), this Court held that race based considerations must "necessarily be subject to a most searching examination" (476 U.S. at 273; *see also Fullilove v. Klutznick*, 448 US 448, 491 (1980)) and applied a two-prong test: (1) racial classifications must be based on a "compelling state interest" (476 U.S. at 274; *see also Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Loving v. Virginia*, 388 U.S. at 11 (1967); *Graham v. Richardson*, 403 U.S. 365, 375 (1971); *United States v. Paradise*, 480 U.S. 149 (1987)) and (2) the "means chosen to effectuate its purpose must be 'narrowly tailored to the achievement of that goal'" (*Wygant* at 274 citing *Fullilove* at 480).

Petitioners argue in their first **QUESTIONS PRESENTED** as follows:

> Was the consideration of race by the New York City Police Commissioner Howard Safir in transferring a proportionally small number of police officers from adjoining precincts into the 70th Precinct to meet the compelling state interest of effective law enforcement constitutionally permissible where there was a highly publicized assault and sexual torture of Abner Louima, a

8. *See also Palmore v. Sidoti*, 466 U.S. 429 (1984); *Graham v. Richardson*, 403 U.S. 365 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967).

> person of Haitian descent, by white police officers, in the 70th precinct, a precinct with an 80% minority population, and the Police Commissioner was advised at a meeting with community leaders, two days after the event, that there was a potential for civil unrest, and accordingly, the Commissioner made those race-based transfers to quell the possibility of civil unrest and violence and to demonstrate to the community the Department's intent to engage in effective, unbiased law enforcement ?

Specifically, they ask whether race based transfers of police personnel may be justified by the department's compelling interest (operational need) in effective law enforcement. Petitioners' question has already been answered by this Court and the constitutional limits of race based discrimination have been firmly established. Therefore, Petitioners' question is not appropriate for review. In addition, both the district court and the Second Circuit clearly agreed that it was entirely reasonable for the jury to conclude that the Petitioners had failed to establish a compelling state interest for the race based transfers.

Petitioners' phrasing of their first **QUESTIONS PRESENTED** reveals their objective: to seek error correction. Petitioners do not claim that there is a conflict between the Federal Circuits. Rather they prefer to urge upon this Court an appeal of a factual determination disguised as a vital question of Constitutional limitations. However, this Court has long held that it "do[es] not grant a certiorari to review evidence and discuss particular facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925), for its "certiorari jurisdiction is designed to serve purposes broader than the

correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring); *see also Ponte v. Real*, 471 U.S. 491, 501-02 (1985) (Stevens, J., concurring) ("The merits of an isolated case have only an oblique relevance to the question whether a grant of certiorari is consistent with the sound administration of this Court's discretionary docket."). The case herein is a singularly inappropriate vehicle for consideration of either of the **QUESTIONS PRESENTED** by the Petition. The Second Circuit correctly followed this Court's admonition that:

> "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980). In determining whether a race-based measure is narrowly tailored, courts consider factors such as the need for the measure, the efficacy of alternative measures, and the flexibility and duration of the measure. *See Paradise*, 480 U.S. at 171; *United States v. Secretary of HUD*, 239 F.3d at 219 (both discussing narrow tailoring in the context of the remedial affirmative action plans) (Opinion of the Second Circuit herein) (B17).

The trial record was correctly read by the Second Circuit when they found that there was a basic factual dispute between the Petitioners and Respondents as to whether or not there was a "compelling state interest" (operational need) sufficient to make race based employment decisions. In its decision, the court below noted that the jury heard testimony from over forty witnesses, including numerous top ranking police officials, that there was no rioting, looting, or other

violence in the 70th Precinct following the Louima incident. Additionally, the jury viewed a videotape submitted by the City depicting a pre-transfer march and orderly demonstration. From the overwhelming facts presented, the jury could have reasonably concluded, and in fact did conclude, that the City had not demonstrated that the transfers were an immediate response to an emergency situation narrowly tailored to meet a compelling state interest. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 314.

Therefore, for the aforementioned reasons, the Petitioners' Writ for Certiorari on the first **QUESTIONS PRESENTED** should be denied.

II. EMOTIONAL DISTRESS DAMAGES WERE PROPERLY AWARDED AND ARE ADEQUATELY SUPPORTED IN THE TRIAL RECORD.

A review of the trial transcript clearly indicates that the jury was presented with two types of evidence to support an award for emotional damages: (1) corroborative evidence and (2) evidence of physical manifestations of emotional distress. The jury was charged, by the trial judge, to include in the verdict sheet their decision of the amount of an award, if any, for emotional distress for each individual respondent. The jury was also asked to indicate on the verdict sheet, as to each respondent, if the individual police officer had proven that their emotional distress was either substantiated by a physical manifestation as indicated by a "P." and or corroborated by other evidence in the record as indicated by "C" (A1378-1379).

It is well recognized that courts may award emotional distress damages in § 1983 cases. *See, e.g., Miner v. City of*

Glens Falls, 999 F.2d 655, 662 (2d Cir. 1993). It is essential that the plaintiff establish that he or she suffered an actual injury caused by the deprivation of constitutional rights and show a direct nexus between the injury and the constitutional violation. *See Carey v. Piphus*, 435 U.S. 247, 263-64 (1978). The damage award must be supported by competent evidence. *See Cohen v. Bd. of Educ.*, 728 F.2d 160 (2d Cir. 1984); *Price v. The City of Charlotte*, 520 U.S. 1116 (1997). This court's decision in *Carey*, supra, was appropriately recognized and applied by the Second Circuit to the case below (B22-23). The Second Circuit also found that evidence of medical treatment was helpful but not required (B23).

The record below is replete with evidence of the damages suffered by all the black police officers transferred into the 70th Precinct. The jury specifically identified on the verdict sheet fifteen plaintiffs that had corroboration and nine that had physical manifestations (A1378-1379). Further, in response to the court's inquiry to the jury foreperson in taking the verdict, the panel responded that in every instance where they found a physical manifestation, there was also corroborative evidence (A1200).

The statement in the Petitioner's Writ of Certiorari that "no corroborating evidence of alleged symptoms was provided by any plaintiff or witness" is completely disingenuous (Pg. 23). The Petitioners, in making such a sweeping statement, have failed to cite any evidence in the record below in support of their argument.

Therefore, for the aforementioned reasons, the Petitioners' Writ for Certiorari on the second **QUESTIONS PRESENTED** should be denied.

The Petitioners ostensibly present a number of constitutional objections to the decision below; none of which are appropriate for this Court's review of the record herein. There exists no basis for review as these issues were correctly decided and affirmed by the courts below.

CONCLUSION

For the foregoing reasons, the Petitioner's Writ for Certiorari should be denied.

Respectfully submitted,

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IN THE

United States Supreme Court

THE CITY OF NEW YORK, RUDOLPH GIULIANI, as Mayor of the City of New York and individually, HOWARD SAFIR, as Police Commissioner of the Police Department of the City of New York and individually, *et al.*,

Petitioners,

against

PATROLMEN BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS TAI AND ROBERTSON IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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THE CITY OF NEW YORK, RUDOLPH GIULIANI, as Mayor of the City of New York and individually, HOWARD SAFIR, as Police Commissioner of the Police Department of the City of New York and individually, PATRICK BRENNAN, New York City Deputy Police Chief Officially and Individually, CORNELIUS J. DEVER, Deputy Police Chief, Officially and Individually and MICHAEL A. MARKMAN, Chief, Officially and Individually,

Petitioners.

PATROLMEN BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INCORPORATED for itself and on behalf of its members, GARY JOHNSON, Police Officer, MISSIE LEWIS-MANNING, Police Officer, ROBERT DRAYTON, Police Officer, MARVA GARDNER, Police Officer, and DEMETRIA SINGLETON, Police Officer, MARGO MCKENZIE, Police Officer, ROBERT WINSLOW, Police Officer, KENNETH ZEPHERIN, Police Officer, OSCAR ESPINAL, Police Officer, DAVE GUEVERA, Police Officer, PEGGY ALVES, Police Officer, ROBIN IRVIN, Police Officer, SILAS PLUNKETT, Police Officer, RONNY FORBES, Police Officer, ALTON WALKER, Police Officer, BARRY HINDS, Police Officer, TSELANEE KITCHING, Police Officer, LAVERNE STUGER, Police Officer, MICHAEL BUTLER, Police Officer, CAROLE P. SIEVWRIGHT, Police Officer, INGER BARRON, Police Officer, and RONALD S. ARCHER, Police Officer, SERGEANT'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., for itself and on behalf of its members PHILIP TAI and JOHN S. ROBERTSON,

Respondents.

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COUNTER-STATEMENT OF FACTS

In November 1998 Respondents Philip Tai and John S. Robertson, sergeants in the New York City Police Department, filed suit in the United States District Court for the Southern District of New York alleging civil rights violations by the Petitioners City of New York, its Mayor, and various high-ranking members of the New York City Police Department. In substance the complaint alleged that the defendants had "transferred [Respondents'] place of employment solely due to their race." The complaint describes Tai and Robertson as "African American."

While Petitioners now assert that Respondents complained about "the City's consideration of their race in transferring them," (Pet. 3), in fact Respondents complained that race was the *sole* consideration in the transfers. As the District Judge noted, "Defendants do not dispute that race was the basis for the transfer decision." (Pet. App. at B28); *see also*, Pet. App. at B66 ("defendants conceded that the transfers were based solely on race"). The transfers were made after the August 9, 1997 assault of a black male (Abner Louima) by a white officer in the 70th Police Precinct in Brooklyn, New York. It is undisputed that the transfers were involuntary. (Pet. App. at B28, B33).

The complaint alleged causes of action under 42 U.S.C. §§ 1981, 1983, and 1985; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 *et seq.*; and various state and city laws. The complaint sought injunctive relief as well compensatory damages. (Pet. App. at B28).

For purposes of pretrial and trial proceedings, the Respondent-sergeants' action was consolidated with an

action filed previously by black officers who also had been involuntarily transferred into the 70th Precinct.

A. The Motion for Summary Judgment

The parties moved and cross-moved for summary judgment or partial summary judgment.

Noting that "Defendants do not dispute that race was the basis for the transfer decision[,]" (Pet. App. at B28),[1] the District Judge concluded that under Equal Protection case law such race-based transfers are subject to strict judicial scrutiny, which means the transfer must promote a compelling governmental interest and be narrowly tailored to meet that interest. Pet. App. at B34-35.

The court accepted Petitioners' position that the "operational needs" of a police department could constitute a compelling state interest. While the need to integrate a police force and make up for past employment discrimination can constitute a compelling state interest, the District Judge noted that the Petitioners "do not rely on the theory of past discrimination to justify their operational needs defense." Pet. App. at B36. Instead, Petitioners argued, and the court accepted, that a compelling state interest can be established by the need to provide effective law enforcement, in the face of an otherwise hostile community, by creating a racially diverse police force. *Id.*

The court further concluded, however, that this "operational needs" defense was a matter for proof at trial, and

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[1] The opinion is reported at 74 F. Supp.2d 321 (S.D.N.Y. 1999).

was not appropriate for resolution by way of summary judgment:

> "However, defendants bear the burden of proving at trial that this compelling state interest actually existed in light of the circumstances in the 70th Precinct during and after August 1997. Thus, in order to prevail on this defense, defendants must demonstrate, at trial, that community hostility towards the NYPD following the Louima incident compromised the goal of effective law enforcement and that race-based transfers would restore that goal." *Id.* at B41.

In support of its conclusion that a trial was required, the court noted in detail that the submissions of the parties showed a sharp factual dispute regarding whether "the potential for violence was as serious as that described by the defendants." *Id.* at B41 n.9.

B. The Trial

At trial Petitioners maintained that the horrendous Louima assault threatened the community's peace and security because there was "the imminent potential for civil unrest," and that community leaders had called for the assignment of officers to the precinct with a closer relation to the ethnic and racial makeup of the community. Pet. at 13.[2] As the District Judge and the Second Cir-

[2] Even the racial composition of those living in the 70th Precinct was in dispute at the trial and was a factual issue for the jury. When asked the black population of the 70th Precinct the police commissioner testified, "I'm not sure, but I think it's in the 80's." (JA. 472). Petitioner repeats this 80% figure as fact. Pet. at 4, 7, 17. But the census figures introduced at trial show that the precinct population is 38.2% white, 40.5% black, 14% Hispanic, and 7.3% Asian. (Pl. Ex. 65, JA. 1300).

cuit found, however, there was ample evidence for the jury to find otherwise.

For example, while Petitioners maintain there was "on-the-ground confirmation" of the police commissioner's assertion that he was faced with imminent violence, Pet. at 20, the Second Circuit noted that the contrary testimony of police officials indicated there was no rioting, looting, or other violence in the 70th Precinct after the Louima incident. (Pet. App. at B8, B17). Indeed, the police commissioner testified that he ordered the race-based transfers without even reading the reports of his own community affairs officers which indicated there was no unrest in the community. (JA.458).[3]

Similarly, while Petitioner maintained that the community wanted black officers transferred into the precinct, City Councilwoman Una Clarke, who represented the part of Brooklyn which includes the 70th Precinct, testified that when she met with the commissioner and other city officials she never called for raced-based transfers of officers into the precinct. Pet. App. at B7. In fact, as the Second Circuit observed, the evidence showed that the black officers transferred into the precinct "endured frequent insults and epithets from community members angry about the Louima assault." Pet. App. at B8.[4] As the Second Circuit further noted, while the Commissioner testified there was an urgent need to respond to the threat of violence, the jury could find this claim of urgency

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[3] "JA." refers to the Joint Appendix filed with the Second Circuit.

[4] As one of the plaintiffs testified, if the community wanted black officers, "[T]hey didn't show it while I was there." (Irvin, JA.388).

belied by the evidence that the race-based transfers were made through ordinary personnel channels and took weeks to effectuate. Pet. App. at B17-18. There was also conflicting expert testimony whether race-based transfers were appropriate.

With matters of credibility and fact in sharp dispute, the District Judge instructed the jury that the defendants had raised an "operational needs" affirmative defense, and as a matter of law "operational needs" can provide a compelling state interest justifying a race-based classification. (JA.1132).

The court further instructed the jury that "operational needs" means

> "a law enforcement agency's need to carry out its mission effectively, with a work force that appears unbiased, is able to communicate with the public and is respected by the community it serves. Put another way, a police department has a compelling state interest in maintaining effective law enforcement and public safety within the community it serves." (JA.1132).

This was the jury charge requested by the Petitioner, and the Petitioner took no exception to it.

The judge also submitted written questions to the jury, one of which read:

> *Question Two, Operational Needs:* "Did defendants prove, by a preponderance of the evidence, that the transfer of plaintiffs into the 70th Precinct based on their race was necessary to maintain effec-

tive law enforcement and to ensure public safety in the wake of the Louima incident?"

Petitioners took no exception to the question. The jury answered this question "No." (JA.1195-1196).

Finally, with respect to emotional distress damages for a violation of 42 U.S.C. § 1983, the Second Circuit concluded that the District Judge's charge was proper. Pet. App. at B23-24. Before the District Court and the Second Circuit Petitioners had argued that emotional distress damages could not be awarded unless the distress was corroborated by physical symptoms of the distress. They conceded that Respondents Tai and Robertson, as well as seven other Respondents, produced evidence of physical symptoms. (App. Brief Second Circuit 73).[5] In Question Two Petitioner raises the new issue of whether corroboration of emotional distress must be presented by someone other than the plaintiff himself. Pet. at 23.

REASONS FOR DENYING THE WRIT

A. The Record Does Not Raise The Questions Presented.

Petitioners were sued by respondent police officers under 42 U.S.C. § 1983 and other statutes for making uniformed police officer assignments to a Brooklyn, New York, precinct based solely on the race of the officers.

Petitioners conceded throughout the proceedings in the District Court and the Second Circuit that the assign-

[5] A similar concession was made at oral argument before the Second Circuit.

ments were "raced based." For a defense, Petitioners requested that the District Judge charge the jury that such raced-based assignments are justified when they meet the "operational needs" of a police department, i.e. under the exigent circumstances of a given case raced-based assignments can serve a compelling state interest in maintaining effective law enforcement and public safety.

The District Judge charged the operational needs defense precisely as requested by Petitioners and without objection by the Petitioners. The District Judge also submitted to the jury a question asking whether the Petitioners proved by a preponderance of the evidence that the race-based assignments were necessary to maintain effective law enforcement and to ensure public safety in the circumstances of this case. Petitioners did not object to the question submitted to the jury.

The jury answered the question "No." In short, the jury determined that the Petitioners did not prove their "operational needs" defense.

Question One, therefore, assumes as a fact a matter explicitly rejected by the jury: that the petitioner police commissioner made the race-based assignments to "quell the possibility of civil unrest and violence and to demonstrate to the community the [Police] Department's intent to engage in effective unbiased law enforcement."

It is, therefore, not clear exactly what Petitioners want this Court to decide. The case was submitted to the jury precisely in accordance with the instructions requested by the Petitioners regarding their "operational needs" defense. The jury explicitly concluded that the Petitioners did not prove their defense. Petitioners do not dispute,

as the District Court and the Second Circuit found, that the evidence reasonably supports the jury's determination. Pet. at B17-18, B19, B66.

Similarly, the record does not raise Question Two. Petitioners ask this Court to decide whether a jury can award identical emotional distress damages to all plaintiffs in a § 1983 where the award is "based exclusively on plaintiffs' subjective testimony." It is settled that emotional distress damages can be awarded under § 1983, *Carey v. Piphus*, 435 U.S. 247 (1978), and that an actual injury under § 1983 includes personal humiliation and mental anguish and suffering. *Memphis Community School District v. Stachura*, 477 U.S. 299, 307 (1986). Question Two, however, fails to raise a viable claim on this record.

First, Petitioners cite nothing inherently wrong with a jury awarding identical emotional distress damages to each plaintiff. The testimony of each plaintiff showed that each suffered the same harm: the humiliation of being singled out solely on the basis of race for an unwelcome and distressing assignment when the record showed the New York City Police Department had never before made such race-based assignments, and when the record showed that every high ranking police official—including the police commissioner—testified that the race of an individual is not relevant to his effectiveness as a uniformed police officer.

Second, under Question Two Petitioners ask this Court to decide whether emotional distress damages can be established on the basis of the testimony of the plaintiff alone. (Pet. at 23). Whether proof of an actual injury of emotional distress requires some sort of two-witness rule is not raised by the record in this case. In the District

Court and in the Second Circuit Petitioners argued that a party cannot recover for emotional distress under § 1983 unless there are physical symptoms of the emotional distress. Indeed, Petitioners conceded before the Second Circuit that Respondents Tai and Robertson and seven others presented evidence of physical symptoms. The Second Circuit concluded that a jury can award emotional distress damages without proof of physical symptoms of the distress. Pet. App. at B24. Question Two, therefore presents matters neither raised nor considered below.

B. The Decision Below Was Correct

The District Judge denied Petitioners' motion for summary judgment pursuant to Fed.R.Civ.P. 56(c), and at the close of the later trial denied Petitioners' motion pursuant to Fed.R.Civ.P. 50 for a directed verdict. For two reasons these rulings were correct, and were properly upheld by the Second Circuit.

First, this is a complicated case involving important public interests and important questions of constitutional law. In such a setting summary judgment is particularly inappropriate. *Kennedy v. Silas*, 334 U.S. 249, 257 (1948) (summary procedures present a "treacherous record for deciding issues of farflung import"); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Askew v. Hargrave*, 401 U.S. 476, 479 (1971). As the District Judge observed, Petitioners were not claiming their race-based decision was designed to remedy past discrimination by a police department. Pet. App. at B35. The novelty and importance of Petitioners' "operational needs" defense required a full evidentiary record.

Second, on this record judgment as a matter of law plainly was not warranted.

The standard for ruling on motions for summary judgment and motions for a directed verdict mirror each other. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Thus, a verdict must be directed "if under the governing law, there can be but one reasonable conclusion as to the verdict. . . . If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *Id.* at 250-251. The matter must be "so one-sided that one party must prevail as a matter of law." *Id.* at 252. There must be, in other words, "but one conclusion" as to the verdict. *Simblest v. Maynard*, 427 F.2d 1, 4 (2nd Cir. 1970).

The same standard applies to motions for summary judgment under Fed.R.Civ.P. 56(c): the motion can be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). In evaluating the motion a court must draw all factual inferences and resolve all ambiguities in favor of the nonmoving party. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970); *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The record shows that both before trial and at the close of the evidence the matter was hardly "so one-sided that one party must prevail as a matter of law." In denying summary judgment the District Judge carefully noted the extensive evidence that the potential for violence was not as serious as that claimed by defendants. Pet. App. at B41 n.9. After trial the District Judge noted the "conflicting evidence as to whether the so-called 'Louima incident'

was a crisis which justified race-based transfers," Pet. App. at B66, as did the Second Circuit. Pet. App. at B17-18.

The conflicting evidence and the credibility determinations were for the jury to resolve. Over 40 witnesses testified at the trial. As the lower courts found, there was considerable evidence on which a reasonable jury could base a finding that in this case Petitioners did not establish their "operational needs" defense. The ruling of the Second Circuit affirming the denial of judgment as a matter of law, and finding ample evidence on which a jury could base its verdict, was plainly correct.

Finally, the Petitioners argue that the race-based assignments were "narrowly tailored." Pet. at 16-17. As the Second Circuit correctly concluded, however, Petitioners did not object to the jury charge on that issue, and, in any event, the issue was never reached by the jury. In rejecting the "operational needs" defense the jury found the Petitioners had failed to prove a compelling state interest for the race-based assignments. It therefore never reached the question of "narrowly tailored." Pet. App. at B20-21.

CONCLUSION

Because the "operational needs" defense was submitted to the jury as requested by the Petitioners, and there is plainly sufficient evidence in the record to support the jury's rejection of the defense, the record does not raise Question One. Similarly, the record does not raise Question Two. The petition, therefore, should be denied.

Respectfully submitted,

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